

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





# 77-1332

To be argued by  
MICHAEL E. TIGAR for Zvonko Basic  
PIERCE O'DONNELL for Julianne Basic

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1332

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

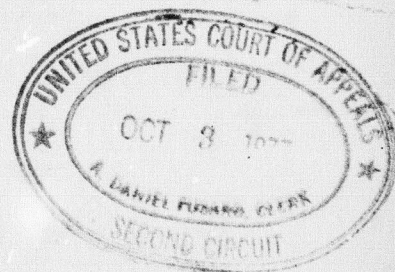
ZVONKO BUSIC, JULIENNE BUSIC,  
PETAR MATANIC, FRANE PESUT,

Defendants-Appellants.

On Appeal from the United States District Court  
for the Eastern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS

ZVONKO BUSIC AND JULIENNE BUSIC



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 77-1332

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
v.  
ZVONKO BUSIC, JULIENNE BUSIC,  
PETAR MATANIC, FRANE PESUT,  
Defendants-Appellants.

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On Appeal from the United States District Court  
for the Eastern District of New York

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BRIEF FOR DEFENDANTS-APPELLANTS  
ZVONKO BUSIC AND JULIENNE BUSIC

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ISSUES PRESENTED FOR REVIEW

1. Whether the District Judge erred by reversing his original ruling and admitting prejudicial evidence seized without a warrant from the handbag of Julie Busic.
2. Whether Zvonko Busic was denied a fair trial by the District Judge's refusal to admit psychiatric testimony that

appellant was incapable of forming the intent necessary to commit the offenses charged in the indictment.

3. Whether the District Judge erred in denying Zvonko Busic and Julie Busic their right to a charge on a lesser included offense.

4. Whether Zvonko Busic and Julie Busic were denied a fair trial by the District Judge's caustic attacks on defense counsel and persistent interference with crucial testimony and by the prosecutor's grossly improper argument.

5. Whether the District Judge erred in refusing to dismiss for lack of jurisdiction Count I of the Indictment charging aircraft piracy resulting in the death of a New York City police officer who was not aboard the aircraft.

#### STATEMENT OF THE CASE

On September 21, 1976, appellants Zvonko Busic and Julie Busic were indicted with three others in the United States District Court for the Eastern District of New York on charges of aircraft piracy resulting in death (Count I), aircraft piracy (Count II), and conspiracy to commit aircraft piracy (Count III).



(Joint Appendix at 115) (hereinafter "App.").<sup>1/</sup> Zvonko Basic filed a pre-trial motion, joined by other defendants, to dismiss Count I for lack of jurisdiction. The Honorable John R. Bartels denied the motion. (App. 303).

Julie Basic filed a pre-trial motion to prevent the use in evidence of her handbag, which had been searched without a warrant. After a hearing, her suppression motion was granted.

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<sup>1/</sup> The three other defendants charged with the same offenses were Petar Matanic, Frane Pesut and Marc Vlastic. At trial Matanic and Pesut were acquitted of Count I but convicted on the second and third counts. They each received a 30-year sentence on Count II and a five-year concurrent sentence on Count III. (Sentencing Transcript of July 21, 1977 at 63, 69). Their appeals from these convictions have been consolidated with those of appellants Zvonko and Julie Basic.

Before trial co-defendant Marc Vlastic entered a plea of guilty to Count II of the indictment. On July 21, 1977, he was sentenced pursuant to a plea agreement to 30 years imprisonment and was made eligible for early parole pursuant to 18 U.S.C. § 4208(b)(2). (Id. at 61-62).

In connection with the same events alleged in the federal indictment, appellants and their three co-defendants were indicted in the New York County Supreme Court (Indictment No. 3879/76) for the offenses of murder in the second degree, kidnapping in the first degree, criminal possession of a dangerous weapon in the first degree, conspiracy in the first degree and assault in the first degree. On his plea of guilty to kidnapping, Marc Vlastic was sentenced to an indeterminate sentence of six to 18 years. The state charges are still pending against the other four defendants.

The appellants in this case have been before this Court on a prior occasion in connection with their unsuccessful bail appeal and the government's successful appeal from the District Court's dismissal of the first two counts of the indictment on the grounds of improper venue. See United States v. Basic, 549 F.2d 252 (2d Cir. 1977).



(App. 280). However, while still on the Bench, Judge Bartels reconsidered and reversed his ruling. (App. 297).

On March 28, 1977, the Busics and their co-defendants Matanic and Pesut went to trial before Judge Bartels. During this six-week trial, the District Court made numerous rulings and behaved in a manner which appellants submit deprived them of any semblance of a fair trial.

Zvonko Basic never denied that he organized and directed the aircraft piracy for which he was being prosecuted. He did assert vigorously, however, that he lacked the requisite intent to commit the offenses charged in the Indictment, although he acknowledged that he might be guilty of some lesser included offense. In particular, Zvonko Basic steadfastly maintained that he was incapable of forming the "wrongful intent" for the offense of aircraft piracy.<sup>2/</sup>

Nevertheless, Judge Bartels refused to admit into evidence testimony from Dr. Bernard L. Diamond, a renowned psychiatrist and criminologist. Dr. Diamond would have testified

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<sup>2/</sup> Before trial the United States Attorney indicated that, pursuant to his discretion under 49 U.S.C. § 1473, he would not seek the death sanction in the penalty phase of the trial if the defendants were convicted of Count I. Significantly for purposes of the issue of intent, the United States Attorney explicitly acknowledged that "the evidence taken in the light most adverse to the defendants would not . . . establish [the] circumstances which Congress has established as a precondition to the imposition of the death penalty." (App. 286).



that due to his mental condition Zvonko Basic could not have had the intent necessary to commit the offenses charged in the Indictment. This ruling prevented the jury from hearing the most important testimony on Zvonko Basic's behalf and left him virtually defenseless.

Throughout the trial, Judge Bartels constantly interjected himself into the proceedings. He interrupted key testimony, disparaged Julie Basic's credibility and incessantly ridiculed defense counsel. The trial conduct of the prosecutor was also grossly improper. His remarks during summation, particularly those flagrantly violating a limiting instruction given on a critical issue, deprived Julie Basic of a fair trial.

In light of the critical importance of the issue of intent, defense counsel requested that the jury be instructed on the lesser included offense of interfering with a flight crew. Despite their argument that interference with a flight crew has a lesser intent requirement than aircraft piracy, Judge Bartels refused to give this instruction.

The trial lasted for six weeks, and 49 witnesses were called to testify. After two and a half days of jury deliberations, Zvonko and Julie Basic were convicted on all three counts on May 5, 1977. Each was sentenced to life imprisonment.



(Sentencing Transcript of July 20, 1977 at 115, 117).<sup>3/</sup> The judgments of conviction and timely notices of appeal were filed on July 20, 1977.

On this appeal Zvonko and Julie Basic seek reversal of their convictions and a new trial on those charges properly prosecutable as federal offenses.

#### STATEMENT OF FACTS

##### A. Undisputed Events

On September 10, 1976, TWA Flight 355, en route from New York to Chicago, was hijacked. Four of the persons indicted for the offenses connected with this incident were Croatian nationalists.<sup>4/</sup> The fifth person charged in the indictment was Julie Schultz Basic,

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<sup>3/</sup> At the appellants' request, this Court permitted the filing of three transcripts of the trial and sentencing in lieu of duplicating these proceedings in their entirety in the Joint Appendix. Consequently, references to the trial and sentencing are to pages of the reporters' transcript on file with the Court.

<sup>4/</sup> Croatia is one of the republics in the political state known as Yugoslavia. Croatia is the most prosperous and economically strategic republic in Yugoslavia. Until its forced union with Serbia and other kingdoms after World War I, Croatia had a long and proud history as a free state. See generally, Stephan Gazi, A History of Croatia (1973).

Supporters of Croatian nationalism believe that Croatia ought to be an independent nation rather than a political subdivision of Yugoslavia. Croatian patriots in this country and abroad charge that Croats are oppressed by the Serbs, the dominant ethnic group in Yugoslavia. They also protest the denial of basic civil liberties by Yugoslavia's communist regime.



a native-born American who had met her co-defendant husband in 1969 while studying in Vienna. The Busics had later married and settled in the United States. (Transcript at 2873-75) (hereinafter "T.").

Zvonko Basic was the self-acknowledged leader and organizer of the hijacking. By smuggling fake bombs aboard the aircraft and seizing control, he hoped to generate world-wide publicity for the cause of Croatian independence. (T. 2910, 2984). To support this bluff, Zvonko bought dynamite and constructed a real bomb which he placed in a locker at Grand Central Station. (T. 2894, 2895, 2908).

With tickets purchased by Zvonko, the five boarded TWA Flight 355 at LaGuardia Airport. (T. 2926-27). Zvonko packed and carried aboard the materials necessary to construct the fake bombs. (T. 2938-39, 2944). Shortly after take-off, Zvonko went into the lavatory and constructed a phoney bomb which he wrapped around his chest. Emerging 15 minutes later, he handed a hijack note to the cabin attendant. (T. 2945, 2948). The note instructed the captain to notify the authorities about the bomb placed in Grand Central Station. (T. 1513).

Two minutes later, Zvonko entered the cockpit of the plane and told the captain, Richard Carey, that the plane was going to Europe. (T. 1523, 1526). Zvonko indicated that he had brought aboard pro-Croatian leaflets which he wanted dropped from



the aircraft. (T. 1533). Captain Carey talked Zvonko into allowing a refueling stop in Montreal. Several minutes later, the plane was diverted from its scheduled course and headed toward Montreal. (T. 1530).

The plane landed at Montreal, refueled, and then departed for Gander, Newfoundland. (T. 1545-48). At Newfoundland, Zvonko allowed thirty passengers to deplane. (T. 1550, 1557). Captain Carey tried to persuade him to switch airplanes at Newfoundland because Flight 355 was a Boeing 727 and unequipped to fly long distances. (T. 1560). After Zvonko refused, the hijacked plane resumed its journey escorted by a Boeing 707 equipped for transoceanic flights. (T. 1559-60).

The two planes proceeded to Keflavik, Iceland. (T. 1567). In Iceland, Zvonko's leaflets were transferred to the 707. (T. 1573). After leaving Iceland, the two aircraft proceeded together to London, where the escort plane dropped leaflets, and then on to Paris where more leaflets were dropped. (T. 1577-79). Flight 355 landed at Charles DeGaulle Airport near Paris at 1:00 p.m. Eastern Daylight Time on September 11, 1976. (T. 1584). Thirty-one hours after it had begun, the hijacking came to an end at 2:30 a.m. EDT on September 12. (T. 1622, 1627).

As Zvonko had requested, authorities in New York had been notified of the bomb in the locker at Grand Central Station. The device was removed from the locker, where the officers also



found a leaflet entitled "Appeal to the American People" and a note demanding that the "Appeal" be published in major newspapers. (T. 1960, 1962, 1974). The device was transported to a disposal pit at Rodman's Neck Pistol Range in the Bronx and an attempt was made to defuse it. (T. 2110, 2120). During this operation, the device exploded, injuring three officers and killing police officer Brian Murray, who was standing over the device. (T. 2142, 2314).

B. Fact-Based Defenses

1. Zvonko Busic

Zvonko Busic's defense was not based on a claim of innocence of any conceivable criminal offense. On the contrary, he freely admitted on the stand his role in masterminding and executing the hijacking. What Zvonko Busic did maintain, however, was that he was mentally incapable of forming the "wrongful intent" essential for conviction of aircraft piracy. He therefore presented uncontroverted evidence -- through his own testimony and the testimony of his wife Julie, his sister, and a close boyhood friend who was a Catholic priest -- about those incidents in his life which contributed to his "abnormal mental condition" at the time of the hijacking.<sup>5/</sup>

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<sup>5/</sup> Zvonko Busic did not claim that he had a "mental disease or defect" or otherwise lacked criminal responsibility under the so-called "insanity test" of United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). See pages 33-38, infra.



Zvonko was born in 1946 in a small village in southern Croatia. (T. 2830). He was the third of eight children. (T. 2831). Zvonko's parents were poor peasant farmers, and he experienced poverty and chaotic social conditions throughout his childhood. (T. 2837-38). As a boy he read extensively about the history of the Croatian people. To attend the only Croatian-speaking grade school, he would walk five miles each way to school. (T. 2831). Gradually, Zvonko became sensitized to the brutal cultural, political and economic oppression of Croatia by the Yugoslavian government. His elders related horrible stories about the Nazi occupation of Croatia and the torture of anti-communists by the Tito regime. (T. 2835-36). As he approached manhood, Zvonko decided to devote his life to the survival of the Croatian people and culture.

While in high school, Zvonko was beaten several times by the police because of his political efforts to preserve the Croatian language and culture. (T. 2850). He refused to join the Communist Party. (T. 2848). Despite his obvious academic success, he was expelled from school at the direction of the dreaded UDBA, the Yugoslavian secret police. (T. 2843).

Because of his pro-Croatian activities, Zvonko has feared for his life over the past ten years. Following a 1967 declaration by Croatian intellectuals supporting preservation of the Croatian culture, Zvonko, then a student at the University of Zagreb, spoke publicly in favor of the protest movement. To avoid arrest by the



UDBA, he was forced to flee his beloved homeland. (T. 2845-49).

Zvonko's life was a nightmare. He was hounded in Europe, being attacked and beaten several times for his pro-Croatian activities. (T. 2866, 2869, 2875). Twice he was shot at while walking along German streets. (T. 2871-2875). His life in the United States was equally unsafe and insecure. While continuing his political work in the Croatian emigre communities in Cleveland and New York, Zvonko received phone calls in the middle of the night threatening his life. (T. 2862, 2883). On several occasions, and just prior to his decision to publicize dramatically the Croatian cause, he was told by close family friends that he was targeted for assassination. (T. 2881, 2884, 2886). His requests for assistance from American authorities went unanswered. (T. 2681, 3589).

The defense offered this evidence to show Zvonko's mental condition at the time of the hijacking. Standing alone, however, the testimony had little significance for a lay jury. It was critical that the jurors evaluate this testimony with the assistance of an expert trained in psychiatry and familiar with Zvonko's life history. Therefore, the defense attempted to admit the testimony of Dr. Bernard L. Diamond, a distinguished forensic psychiatrist and criminologist and a widely-experienced



expert in these types of cases.<sup>6/</sup> If permitted to take the stand, Dr. Diamond would have testified in part:

"It was in this frame of mind -- a highly abnormal mental state, in my opinion -- that he determined to perform one last, meaningful, heroic act for the benefit of the Croatian cause.

\* \* \*

" . . . In terms of an element of criminal intent implying the power of free-will, choice and decision as exercised by ordinary men, Zvonko Busic lacked, in my opinion, the capacity for such criminal intent. He did what he did out of psychological necessity, not free choice." <sup>7/</sup>

With the exclusion of Dr. Diamond's testimony, the jury was free to convict Zvonko on all three counts, despite the fact that he presented compelling evidence that he lacked the requisite intent required for the offenses charged. Likewise, without Dr. Diamond's testimony and appropriate instructions from the court, the jury never considered Zvonko's culpability for a lesser included offense.

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<sup>6/</sup> For the convenience of the Court, we have set forth in Appendix A to this brief the professional qualifications of Dr. Diamond.

<sup>7/</sup> For the convenience of the Court, we have reproduced in Appendix B to this brief Dr. Diamond's written evaluation prepared prior to trial and offered to the court and prosecution. The Joint Appendix also contains the formal deposition of Dr. Diamond taken as an offer of proof after Judge Bartels ruled inadmissible Dr. Diamond's proposed testimony. (App. at 484).



2. Julie Busic

Julie Busic did not deny that she accompanied her husband on Flight 355 or that she remained by his side during the 31-hour ordeal. She did assert, however, that she did not intend to participate in a hijacking and that she had not done so. Her testimony at trial corroborated this defense. Moreover, the jury heard no testimony to the effect that Julie knowingly and voluntarily planned the hijacking. Consequently, the government's case rested solely on circumstantial evidence, not the least of which was Julie's marriage to the acknowledged leader of the hijacking. The jury could have found the following facts to be true.

Zvonko was always very secretive about his Croatian political activities. (T. 3522, 3531). He first mentioned the subject of hijacking to Julie in January or February, 1976 when talking about a newspaper article. (T. 3532). Several days later, he asked her to look up international laws dealing with hijacking. (T. 3533). Accompanying him to the library, she was asked to find books about aircraft. (T. 3538).

The next day Zvonko showed her photocopies he had made from an aircraft book and asked her if it would be possible to drop leaflets from a plane window. (T. 3541). Immediately concerned, Julie demanded to know why he would ask such a question. (Id.) Zvonko laughed and assured her that he intended nothing unlawful. (T. 2887-88). Never having known her husband



to do anything illegal, Julie was convinced. (T. 3542). The subject was then dropped.

In June of 1976, however, her husband became even more secretive than usual. The Busics began to receive threatening phone calls at home during all hours of the night. Zvonko thought people were following him, and he began to act very frightened. (T. 3554-55). The Busics decided to leave New York. In mid-August, she quit her job and told her parents and friends that they were moving to the West Coast. (T. 3558, 3562).

On Labor Day Julie went with Zvonko while he bought two tickets for Chicago under assumed names. (T. 3560). He reassured her that the false names were for protection. While Julie was not satisfied with his explanation, she could get no more information from her increasingly secretive husband. (T. 3563).

Zvonko later told Julie that he was becoming desperate due to the threats on his life and that he wanted to try to drop pro-Croatian leaflets from an airplane window. (T. 2911-12, 3568). Julie repeatedly tried to talk her husband out of this foolhardy scheme. (T. 3569, 3576). When Zvonko went so far as to mention the use of false weapons, Julie begged him to think it over. (T. 3570). Appalled by Zvonko's remarks, she suggested that he speak with government officials about the threats. (T. 3589-90).

Julie never made a conscious decision to accompany Zvonko on the flight. (T. 3591). She was frightened for her



husband, and she was frightened for herself. She feared she would never see Zvonko again. (T. 3590).

The week before the flight, Julie found the note that later accompanied the bomb in the locker. (T. 3594). When she confronted Zvonko, he refused to answer her questions but nevertheless assured her everything would be all right. Julie replied that his response was inadequate. Zvonko again told her that he was opposed to violence and that he could never hurt anybody. (T. 2596).

Julie never knew that Zvonko had bought dynamite, much less that he had constructed and planted a live bomb. (T. 2885, 2906, 3151, 3597). When Julie boarded TWA Flight 355 on September 10, she had not helped, and had no intention of helping, Zvonko to carry out his plan. (T. 3597). Indeed, she did not even know the nature of the plan. Zvonko had never told her that he intended to hijack the plane. (T. 2887-88). Her response to this mind-boggling succession of events and her motivation for boarding Flight 355 were human and emotional. Julie thought she was pregnant, and she feared never seeing her husband again. (T. 3597). She was not strong enough to stay behind. (Id.)

Once aboard, Julie never became part of the hijacking. She was surprised when she learned of Zvonko's take-over of the plane, and she tried to persuade him to surrender. (T. 3055). At first Julie did not know what to do. She tried to get information from Zvonko to keep the passengers informed and passed out

his pro-Croatian leaflets. (T. 3598-3601). During the rest of the trip, Julie merely ministered to the needs of the passengers by bringing them pillows, blankets, and anything they wanted from their carry-on luggage. (T. 3606-07). Throughout the seizure of TWA Flight 355, Julie was helpful and a calming influence. She never carried a weapon and never yelled at or harassed anyone. (T. 1686-87). Indeed, one of the passengers noticed that Julie was "as frightened and terrorized as the rest of us." (T. 3470). All her actions were devoted to promoting the welfare of the passengers. (T. 3460).

After unsuccessfully trying to persuade Zvonko to release all the passengers at Newfoundland, Julie helped those who were allowed to leave the plane. (T. 3602). Julie told one of the exiting passengers: "I wish I could get off with you." (T. 3489).

Once in Paris, Julie continued to press her husband to end the hijacking. Her insistence sparked two violent disagreements with Zvonko. (T. 3467, 3471, 3614). Zvonko would not end the hijacking, however, until he was certain that his "Appeal" had been printed in American newspapers. Not until Julie, at her own suggestion, left the plane, called New York, and assured Zvonko his demands had been met did this 31-hour hijacking come to an end. (T. 3625, 3629, 3632).

The foregoing testimony was largely uncontroverted. To establish Julie's guilt, the prosecution relied primarily upon



four critical pieces of evidence -- each of which were sharply challenged with rebutting testimony and two of which were improperly placed before the jury.

First, the government argued that Zvonko had told Julie before the hijacking that the bag containing the real dynamite was dangerous. (T. 5377-5377a, 5392, 5441-42). The prosecution thus sought to show that Julie testified falsely that she did not know Zvonko intended a dangerous act and that she had no role in planning the hijacking. However, Zvonko denied telling his wife of any danger (T. 3151), and the government's affirmative use of this evidence against Julie was plainly improper and highly prejudicial. See pages 57-59, infra.

Second, the prosecution argued that copies of two diagrams from the aircraft book found in Julie's handbag also indicated her full and knowing participation in the crime. (T. 5341, 5371, 5392, 5445, 5763). Julie testified, however, that the diagrams were not in her purse when she entered the plane, but that she may have picked them up during the flight. In any event, the two photocopied pages were among the unlawfully seized contents of Julie's handbag which were erroneously admitted into evidence. See pages 19-32, infra.

Third, the prosecution asserted that Julie's fingerprints found on the demand note in the Grand Central Station locker indicated her involvement in all aspects of the hijacking. Julie admitted that she had handled the note when confronting



Zvonko with it before the hijacking. She further testified, however, that Zvonko had assured her that he was opposed to violence and could never hurt anyone. More importantly, she testified that she had no knowledge about any live bomb, and the government offered no evidence to the contrary.

Finally, the government argued that Julie's presence on the plane after her discussions with Zvonko indicated an intention to commit the crime. However, the jury heard testimony from several witnesses about Julie's repeated efforts to persuade Zvonko to surrender and her role in ending the hijacking.

For Julie Basic, therefore, the critical question was whether the jury believed her testimony. In a nutshell, Julie's fate turned on the issue of her credibility. The weight to be accorded to the testimony of the accused is one of the most difficult functions for a jury and a task which it is given little guidance to perform.<sup>8/</sup> The jury's ability to acquit this delicate responsibility intelligently necessarily depends on the impartiality of the trial judge and the fairness of the prosecutor. In this case, Julie Basic never had a fighting chance.

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<sup>8/</sup> See 1 Wigmore on Evidence § 26 at 401 (3d ed. 1977).



## ARGUMENT

### I.

#### THE TRIAL JUDGE ERRED BY REVERSING HIS ORIGINAL RULING AND ADMITTING EVIDENCE SEIZED WITHOUT A WARRANT FROM JULIE BUSIC'S HANDBAG

##### A. Julie's Handbag Was Searched Without Her Consent or A Warrant

When the seizure of TWA Flight 355 ended, Julie Busic and the other defendants were taken into custody by French officials, placed aboard a French military aircraft, and flown to the United States. From the time of their surrender, the suspects' luggage was in French custody. Upon arrival at Kennedy Airport in New York at about 4:00 p.m., the French jet was boarded by FBI Agent Roland L'Allier. (T. 767). L'Allier asked the French officials where the suspects' luggage was located, and was told that it was in the front of the aircraft. (T. 768, 775-76). Julie's handbag was among this luggage. From the moment of her arrest by French officials, however, it had never been in her custody or control. (T. 768). Agent L'Allier took custody of the luggage and took it with him to FBI headquarters in Manhattan (T. 770) -- one hour and thirty minutes after the plane had landed and one hour and fifteen minutes after Julie had been taken from the plane. (T. 774, 776).

Julie was taken to FBI headquarters in Manhattan, arriving there at about 5:00 p.m. (App. 253). She was met by FBI Agent Dennedy, advised of her rights, and strip searched.



(App. 254, 263A). After being readvised of her rights at 5:30 p.m., Julie stated that she did not wish to answer any questions without an attorney. (App. 257, 259-263B). Julie also told Agent Dennedy that she was disoriented from exhaustion, not having slept from Friday to Sunday. (App. 260). In fact, Julie fell asleep with her head on a desk. (Id.).

At about 6:30 p.m. Julie was asked to identify and to consent to a search of her luggage without the presence of counsel. (App. 263C). Julie consented to a search at least thirty minutes before she identified what was to be searched. (T. 263J-263L). It was not until the next day that Julie's handbag (Gov't. Exh. 37) was actually examined. (T. 3438). The bag had remained overnight in an office belonging to an FBI supervisor. (T. 2448). At the time of the search, no one made an inventory of the contents of the handbag. (T. 2450).

Julie's counsel moved to suppress the contents of the handbag. (App. 136). The government argued that Julie had consented to the warrantless search. In a written decision, Judge Bartels explicitly rejected the government's contention and found that her identification of the luggage, as well as her consent to search it, were involuntary. (App. 280). The suppression motion was granted, and copies of the Judge's ruling were handed to counsel in open court. (T. 706).

The government immediately asked to present additional testimony and argue a new theory for sustaining the warrantless



search. (T. 732). Over defense counsel's objections, additional testimony was taken. (T. 766). Judge Bartels then ruled that the handbag was not within Julie's custody and could not be searched as an ordinary incident of her arrest. (App. 300-01). However, he further ruled that

" . . . in view of the whole alleged circumstances of this case they had probable cause to believe that in the inventory of the handbags some dangerous explosives might be found . . . . That would justify, it seems to me, a search." (App. 301-02).

The FBI had searched Julie's handbag and seized two photocopies of diagrams of Boeing aircraft. In its case-in-chief, the prosecution introduced this evidence (Gov't Exh. 40). (T. 2454). The diagrams were crucial to the government's case against Julie, and the prosecutor made extensive use of them. In addition to arguing that this piece of evidence was sufficient to overcome Julie's motion for directed verdict (T. 2569), the prosecution repeatedly used the Boeing diagrams to attack Julie's testimony that she did not intend to participate, and had not participated, in planning the hijacking.

The diagrams became the chief weapon in the government's unrelenting assault on Julie's credibility. Not only did the prosecutor confront her with this evidence on cross-examination (T. 3682-84), during his summation he discussed the diagrams five separate times. (T. 5341, 5371, 5392, 5445, 5763). At one point he argued that Julie was implicated in the crime "as a matter of



law". To support this improper remark, he invited the jury's attention to the "zerox [sic] copy in her bag." (T. 5371). Elsewhere government counsel argued to the jury:

"Now, with respect to the 727 Xerox thing, Exhibit 40 in evidence, this was found in her handbag with her fingerprints and Mr. Basic's fingerprints on it.

"Again, what is Mrs. Basic doing in possession of a document which indicates that this thing was carefully and sophisticatedly planned? She's not going to admit that she brought this into the plane with her." (T. 5392).

The admission of the diagrams seized after searching Julie's handbag without a warrant or her consent played a major role in the government's case against her. If the search and seizure was unlawful -- and we submit that it plainly was -- Julie's conviction on all counts must be reversed.

B. The Government Offered No Evidence Whatsoever To Sustain the Warrantless Search Under Any of the Few and Narrow Exceptions to the Fourth Amendment's Warrant Requirement

This case raises a fundamental question about the integrity of the federal judicial process. Julie Basic's conviction was obtained with the use of evidence seized from her personal handbag without a warrant long after the alleged offense had ended and she had been arrested, and almost a day after the handbag was taken into the control and custody of the FBI. The District Court's apparent rationale for sustaining the search -- the FBI's supposed fear about possible explosives in her handbag -- is fanciful.



More importantly, the prosecution produced no testimony whatsoever that the purported fear of explosives was a motivating factor for the FBI's search of Julie's handbag.<sup>9/</sup>

Julie Busic calls upon the Court to assure that the "warrant clause of the Fourth Amendment is not dead language." United States v. United States District Court, 407 U.S. 297, 315 (1972). The constitutional requirement that law enforcement officers obtain a warrant before searching the personal belongings of a citizen is a cherished freedom of a free people.

"It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important part of our working machinery of government, operating as a matter of course to check the well-intentioned but mistakenly overzealous officers who are a part of any system of law enforcement." Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971).

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<sup>9/</sup> The government offered the testimony of four FBI agents in connection with Julie's handbag. Agent Margo Dennedy testified only about Julie's putative consent (App. 251).

The government then advanced its new theory about search incident to an arrest. However, when Agent Ronald L'Allier testified, he never mentioned any official concern about the dangerous contents of any of the suspects' luggage. (T. 767-77).

FBI Agent Hittmeier testified that Julie's handbag had been searched because she had signed a consent form. (T. 1335). He made no mention of explosives.

Finally, the government offered at trial the testimony of Agent James V. Downey, who had searched Julie's handbag the morning after she was returned to New York by the French authorities. (T. 2436-53). Downey was never told of any potential danger from the handbag.



Warrantless searches are "'per se unreasonable under the Fourth Amendment -- subject to only a few specially established and well-delineated exceptions.'" Id. at 454-55, quoting Katz v. United States, 389 U.S. 347, 357 (1967); see also United States v. United States District Court, supra, 407 U.S. at 314-21. These exceptions to the warrant requirement are "jealously and carefully drawn." Jones v. United States, 357 U.S. 493, 499 (1958); see also Camara v. Municipal Court, 387 U.S. 523, 529 (1967). The circumstances justifying a warrantless search must be truly exceptional, and the government always bears the heavy burden of showing that "the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1948).

In this case, the government failed to establish that the FBI had probable cause to believe that Julie's handbag contained explosives. Indeed, the government introduced no evidence to show why it elected to dispense with a warrant. Its failure to offer any justification is fatal. The Supreme Court has repeatedly admonished that the protections of the Fourth Amendment's warrant requirement cannot be frittered away by arguments of

"inconvenience to the officers and some slight delay necessary to prepare papers and present evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was . . . not of a movable vehicle. No evidence or contraband was threatened with removal or destruction . . . ." Johnson v. United States, 333 U.S. 10, 15 (1948).



1.    The Search of Julie's Handbag Was Not  
      Incident to Her Arrest or Necessitated  
      By Exigent Circumstances

The government sought to justify the warrantless search of Julie's handbag as a search incident to her lawful arrest. See, e.g., Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, 267 U.S. 132 (1925); Weeks v. United States, 232 U.S. 383 (1914). Judge Bartels readily recognized, however, that this exception to the warrant requirement was plainly inapplicable because at no time after her arrest did Julie have custody or control of her handbag. (T. 778). The trial court properly rejected government counsel's invitation to disregard the settled teaching of the Supreme Court that the Fourth Amendment's exception for a search incident to arrest is "a strictly limited right", Trupiano v. United States, 334 U.S. 699, 708 (1948), and extends only to "a search of the arrestee's person and the area 'within his immediate control' -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). Since it is undisputed in this case that Julie's handbag was not within her control and that the search was "remote in time [and] place from the arrest," Preston v. United States, 376 U.S. 364, 367 (1964), the search incident to arrest justification fails.



This case is squarely controlled by the most recent Supreme Court decision on the issue. In United States v. Chadwick, 45 U.S.L.W. 4797 (U.S., June 21, 1977), the defendants were arrested for narcotics violations while in possession of a locked footlocker. At all times thereafter, the defendants' footlocker remained under the exclusive control of federal law enforcement officers. The items were taken to a federal building. An hour and a half after the arrests, the agents searched the luggage without a warrant.

At the suppression hearing, the agents admitted that they had no reason to believe that the footlocker contained explosives or other inherently dangerous items or other evidence which would lose its value unless the footlocker were immediately opened. The District Court suppressed the evidence. The First Circuit affirmed. United States v. Chadwick, 532 F.2d 773 (1st Cir. 1976).

The Supreme Court agreed with the courts below and held that the search did not fall within the narrow arrest exception to the warrant requirement. The rationale for the Court's decision in Chadwick dispels any doubt that the search of Julie's handbag was unlawful.<sup>10/</sup>

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<sup>10/</sup> In reversing its earlier decision to suppress the evidence, the trial court may have been led into error by the

(Footnote continued)



First, the defendants in Chadwick had a reasonable expectation of privacy, and by placing their personal effects in a footlocker, they had "manifested an expectation that the contents would remain free from public examination." 45 U.S.L.W. at 4800. The Supreme Court rejected the government's argument that luggage is analogous to motor vehicles and therefore subject to diminished Fourth Amendment protection. By the same token, Julie's handbag was obviously "intended as a repository of personal effects" and its contents were "not open to public view." Id.

Second, the Supreme Court held that the luggage's mobility did not justify abandoning the warrant requirement. "Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston federal building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained." Id. at 4800. In Julie's case, she lost total custody and control of her handbag in Paris, and it was in the hands of French and American authorities for at least

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(Footnote continued)

10/ confident prediction of government counsel that the Supreme Court had granted certiorari in Chadwick to reverse the First Circuit and to hold that the warrantless search was lawful. See Letter from Edward R. Korman to Judge Bartels, dated March 23, 1977.



30 hours before the search.<sup>11/</sup>

Finally, the Supreme Court in Chadwick flatly rejected the government's bid to overrule Chimel and Preston and to abandon the requirement that a warrantless search incident to arrest be contemporaneous with the arrest.

"Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

"Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody . . . ."  
Id. at 4801 (footnote omitted).

From the moment of her arrest, Julie Busic had no opportunity to gain access to the handbag in FBI custody, and the search was conducted at least 16 hours after she was turned over to the FBI at LaGuardia Airport.

Although the government never advanced the argument, the District Court apparently sustained the search because of "exigent circumstances" relating to the possibility of explosives in Julie's handbag. This conclusion is clearly erroneous.

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<sup>11/</sup> The suspects surrendered in Paris at 2:30 a.m. EDT on September 12. (T. 1622). FBI Agent Downey did not search the handbags until at least 8:15 a.m. EDT on September 13. (T. 2436-37).



First, the record contains no evidence that the FBI or French authorities had any fear -- much less probable cause to believe -- that Julie was carrying explosives in her luggage. See note 9, supra.

Second, all the evidence suggests the opposite. After the French plane landed at LaGuardia, the FBI waited over an hour to remove the bag from the plane. Indeed, they transported it to FBI headquarters where it remained overnight in a supervisor's office. Obviously, no one worried about explosives, and no one rushed to conduct a search. Moreover, FBI Agent Downey, who almost a day after Julie's arrest was finally assigned to search the handbag, was told merely to examine the contents of the handbag. (T. 2436-37). Common sense dictates that if the agents had "reason to believe the luggage contain[ed] some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage and disarming the weapon. See, e.g., United States v. Johnson, 467 F.2d 630, 639 (CA2 1972)." United States v. Chadwick, supra, 45 U.S.L.W. at 4801 n.9.

2. The Personal Belongings in Julie's Handbag Were Not Seized Pursuant to a Valid "Inventory Search"

To the extent that the District Court's truncated ruling can be read as sustaining the search of Julie's handbag as a so-called "inventory search", this justification is equally



untenable. Under settled Supreme Court precedent, Julie's personal belongings in her handbag could not be searched without a warrant under the guise of a routine examination to itemize and record its contents.

First, the District Court was presented with no evidence showing that the purpose of the search was an inventory. All the evidence pointed to the contrary. The agent who conducted the supposed inventory testified at trial that he "was instructed to examine the contents of the bag" and that he removed several items from the bag, including the Boeing diagrams. (T. 2436-37).<sup>12/</sup> While he later testified that an inventory was made, it was not made by him at the time of his search of the handbag. (T. 2449-50). Indeed, the inventory was not even made that day. (T. 2450).<sup>13/</sup>

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<sup>12/</sup> The FBI's request that Julie sign a consent search form also belies any argument that this was a routine inventory search. These forms are an explicit waiver of rights and are used when law enforcement officers want to search for evidence to be used against the suspect. If the FBI had wanted to conduct a legitimate examination of the handbag merely to inventory its contents for safekeeping, they would not have requested Julie's consent. Indeed, FBI Agent Hittmeier testified that Julie's handbag was searched only because she had signed a consent search form. (T. 1335). The other suspects' luggage was not searched because they had not executed the consent search forms. (T. 1334).

<sup>13/</sup> Even if the search could charitably be viewed as an inventory, the government failed to offer any evidence that the inventory was conducted according to the routine procedures of the FBI. United States v. Hellman, 556 F.2d 442, 444 (9th Cir. 1977). The Supreme Court has suggested that

(Footnote continued)



This Court has held that the inventory search exception is inapplicable where the search is conducted "for the purpose of securing incriminating evidence." United States v. Capra, 501 F.2d 267, 280 (2d Cir. 1974), citing Cady v. Dombrowski, 413 U.S. 433, 443 (1973); see also United States v. Hellman, supra, at 444. There can be no doubt here that the so-called inventory search "conceal[ed] an investigatory police motive." South Dakota v. Opperman, supra, 428 U.S. at 376.

Second, the inventory search exception does not apply to a suspect's personal belongings. Whatever may be the diminished expectation of privacy for automobiles, see South Dakota v. Opperman, supra, 428 U.S. at 367-68, "luggage is intended as a repository of personal effects [and] a person's expectations of privacy in personal luggage are substantially greater than in an automobile." United States v. Chadwick, supra, 45 U.S.L.W. at 4800. Likewise, whatever warrantless searches of the person

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(Footnote continued)

13/ inventory searches must be "carried out in accordance with standard procedures . . . to ensure that the intrusion [is] limited in scope to the extent necessary to carry out the caretaking function." South Dakota v. Opperman, 428 U.S. 364, 375 (1976) (emphasis in original; citation omitted). The government's failure to present any evidence about FBI inventory practices or the "routine" nature of this search is fatal and mandates a finding that the search was unlawful. Beck v. Ohio, 379 U.S. 89 (1964); United States v. Hellman, supra; United States v. Shkoza, 406 F. Supp. 1065 (S.D.N.Y. 1975).



are authorized after an arrest, United States v. Edwards, 415 U.S. 800 (1974); United States v. Robinson, 414 U.S. 218 (1973),

"searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest."  
United States v. Chadwick, supra, 45 U.S.L.W. at 4801 n.10.

In this case, Julie Busic had an even greater expectation of privacy in her personal handbag -- where private notes, phone numbers and addresses are commonly kept -- than the defendants had in their footlocker in Chadwick.

The search of Julie Busic's handbag and the seizure of its contents, without her consent or a warrant, was manifestly unconstitutional. Under long-standing precedent, none of the rationales belatedly offered by the government or relied upon by the District Court -- search incident to arrest, exigent circumstances and inventory search -- can sustain this search and seizure. "We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily." McDonald v. United States, 335 U.S. 451, 455 (1948). Julie's conviction must be reversed.



II.

THE TRIAL JUDGE IMPROPERLY DEPRIVED ZVONKO BUSIC OF A DEFENSE BY REFUSING TO ADMIT PSYCHIATRIC TESTIMONY THAT HE WAS INCAPABLE OF FORMING THE INTENT NECESSARY TO COMMIT THE OFFENSES CHARGED IN THE INDICTMENT

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A. Dr. Diamond's Excluded Testimony Was Critical Evidence in Zvonko Basic's Defense

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Pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure, Zvonko Basic filed a timely pretrial notice of his intention to rely upon a defense of "abnormal mental condition" negating the mental state required for the offenses charged in the indictment.<sup>14/</sup> He did not intend to rely upon the so-called "insanity defense" in the sense that he was not criminally responsible for his conduct under United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966). Rather he sought to establish that, while he might be guilty of a lesser offense, his mental condition before and during the hijacking prevented him from formulating the

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<sup>14/</sup> Rule 12.2(b) provides:

"If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."



"wrongful intent" required by the federal aircraft piracy statute (49 U.S.C. § 1472(i)(2)).

The uncontroverted testimony of Zvonko Busic and his wife, sister, and close boyhood friend established that, for several years before the hijacking, he had lived under extreme pressure. He had been victimized by assaults, assassination attempts, and late-night threatening phone calls. Rootless and increasingly restless, Zvonko came to define his life in terms of striking one last heroic blow for Croatian freedom. See pages 9-12, supra. In any conventional sense, he was not acting "normally".

The defense therefore sought to present the testimony of Dr. Bernard L. Diamond. As Appendix A to this brief shows, Dr. Diamond is a world-renowned expert in law and psychiatry. A professor on the law, medical and criminology faculties at the University of California at Berkeley, Dr. Diamond has authored dozens of books and articles on a wide variety of subjects dealing with criminal responsibility and "abnormal mental conditions". After examining Zvonko several times, Dr. Diamond had concluded in part as follows:

"The skyjacking, the placement of the bomb in the downtown locker, and all of the complicated preparations were, in my opinion, the acts of a desperate man, in a highly abnormal mental state, acting out of fear and compulsive determination. Believing in the righteousness of his cause and in the imminence of his own death, he felt compelled to plan and perform what was to be one last



heroic act: to inform the entire world of the cause of the Croatian people, language and culture. . . .

"Taking into consideration Zvonko Basic's lifelong social and cultural indoctrination, the social and political circumstances of his childhood and adolescence, his total preoccupation with the Croatian cause, the belief in the reality threat to his own life, and his obsessive and fanatical determination to perform one last act of value to his people, it seems clear to me that he lacked the mental ability to make the choice or decision to do other than what he did do. In terms of an element of criminal intent implying the power of free-will, choice and decision as exercised by ordinary men, Zvonko Basic lacked, in my opinion, the capacity for such criminal intent. He did what he did out of psychological necessity, not free choice." (Emphasis added.) 15/

After considerable confusion, Judge Bartels refused to permit Dr. Diamond to testify. (App. 479-483).

Zvonko Basic's hope for acquittal of aircraft piracy largely hinged on his Rule 12.2(b) "abnormal mental condition" defense. Because the mental processes and state of mind of an alleged aircraft hijacker are beyond "the host of attitudes and syndromes that are a part of daily living", United States v.

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15/ In addition to a deposition of Dr. Diamond (App. 484), the defense made an offer of proof to the trial judge of a written report summarizing Dr. Diamond's opinion about Zvonko's "abnormal mental condition". This report is reproduced in Appendix B to this brief, and the excerpts quoted above appear on pages 3 and 4.



Bright, 517 F.2d 584, 586 (2d Cir. 1975), any intelligent assessment required the expert assistance of a trained forensic psychiatrist like Dr. Diamond. His expert testimony was highly "relevant" and "critical". United States v. Dwyer, 539 F.2d 924, 927 (2d Cir. 1976).<sup>16/</sup> The exclusion of Zvonko's Rule 12.2(b) defense and Dr. Diamond's testimony was clearly reversible error, United States v. Dwyer, supra, and a deprivation of due process and the right to compulsory process. Cf. Washington v. Texas, 388 U.S. 14, 19 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973).

B. Dr. Diamond Should Have Been Permitted to Testify Because Aircraft Piracy Requires a Specific Intent as an Element of the Offense

Rule 12.2 of the Federal Rules of Criminal Procedure recognizes two types of defenses based upon a "mental condition": (a) the classic "defense of insanity", and (b) "a mental disease, defect or other condition" inconsistent with the mental element required for the offense charged. (Emphasis added.) Since Zvonko asserted the latter defense, the pertinent question becomes what

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<sup>16/</sup> The Fifth Circuit has adopted the following definition of "critical evidence" for purposes of due process:

"Evidence that, when developed by skilled counsel and experts, could induce reasonable doubt in the minds of enough jurors to avoid a conviction." White v. Maggio, \_\_\_ F.2d \_\_\_ (5th Cir., August 8, 1977) (slip op. at 5056).



prerequisites must be satisfied to invoke Rule 12.2(b). The answer is provided by United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), a decision which Judge Bartels recognized as controlling. (App. 512).<sup>17/</sup>

In Brawner, the District of Columbia Circuit comprehensively discussed the Rule 12.2(b) defense based on a defendant's mental condition which, although "abnormal", falls short of legal insanity because it does not qualify as a "mental disease or defect". See United States v. Freeman, *supra*, 357 F.2d at 622. The Court, speaking through Judge Leventhal, held as follows:

"[E]xpert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime -- even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration." 471 F.2d at 998. <sup>18/</sup>

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<sup>17/</sup> While this Court has never explicitly adopted Brawner on this issue, it has embraced its reasoning by implication. United States v. Steinberg, 525 F.2d 1126, 1132 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Judge Bartels' view that Brawner is the law of the Second Circuit is not shared by at least one of his trial court colleagues. See United States v. Pawlak, 352 F. Supp. 794 (S.D.N.Y. 1972).

<sup>18/</sup> In addition to the Second Circuit, Brawner has been adopted by at least two other circuits. See United States v. Bennett, 539 F.2d 45, 52-53 (10th Cir. 1976); United States v. Demma, 523 F.2d 981, 986-87 (9th Cir. 1975). In announcing the standards for the "abnormal mental condition" defense, the District of Columbia Circuit in Brawner noted that it was following the lead of at least 16 states. 471 F.2d at 1000-01.



The admissibility of expert testimony as to the accused's "abnormal mental condition" is governed by three considerations: (1) whether "it is relevant to negative, or establish, the specific mental condition that is an element of the crime", (2) whether "the testimony is grounded in sufficient scientific support to warrant use in the courtroom", and (3) whether the expert testimony "would aid the jury in reaching a decision on the ultimate issues." United States v. Brawner, supra, 471 F.2d at 1002 (footnote omitted). In light of Judge Bartels' decision to exclude Dr. Diamond's testimony only under the first consideration, the sole question presented is whether the trial court correctly ruled that aircraft piracy is a so-called "general intent" crime. (App. 511-519).<sup>19/</sup>

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<sup>19/</sup> In his trial memorandum supporting the admissibility of Dr. Diamond's testimony, Zvonko Basic conclusively demonstrated that the second and third prerequisites under Brawner were satisfied. (App. 328-29, 342-43). Under Rule 703 of the Federal Rules of Evidence, the basis for his expert opinion was information "of a type reasonably relied upon by experts in the [psychiatric] field . . . ." See generally United States v. Cyphers, 553 F.2d 1064, 1072 (7th Cir. 1977). He had interviewed Zvonko three times and had talked with family members. (App. B). Rule 803(4), Federal Rules of Evidence; Alexander v. United States, 318 F.2d 274 (D.C. Cir. 1963); United States v. Bohle, 475 F.2d 872 (2d Cir. 1973) (psychiatric testimony based on defendant's life history admitted in aircraft piracy prosecution although psychiatrist interviewed defendant only once). In forming his opinion, Dr. Diamond was not limited solely to medical or psychiatric aspects of Zvonko's mental state. United States

(Footnote continued)



The jurisprudence of criminal intent is rife with confusion and contradiction. See generally W. LaFave & A. Scott, Handbook on Criminal Law § 27 at 191-95 (1972). The same term can take on different meanings in different contexts. See, e.g. United States v. Tolkow, 532 F.2d 853, 858 (2d Cir. 1976). Nevertheless, the law recognizes at least three types of intent (or "mens rea") as a basis for criminal liability: no intent (strict liability), purposeful, and willful.

At the threshold level of intent are the "strict liability" offenses. One may be convicted of such an offense even though the illegal act was accidentally or unintentionally committed. See Morissette v. United States, 342 U.S. 246, 255-56 (1951). Penalties for these crimes are "relatively small", and conviction ordinarily does no grave damage to an offender's

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(Footnote continued)

19/ v. Brawner, supra, 471 F.2d at 995; see also Blake v. United States, 407 F.2d 908, 911 (5th Cir. 1969).

Under Rule 702 of the Federal Rules of Evidence, the expert testimony of one of this country's most experienced forensic psychiatrists (see App. A to this brief) would surely "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." See United States v. Dwyer, 539 F.2d 924, 927 (2d Cir. 1976) (conviction reversed for failure to allow critical and relevant psychiatric testimony). Psychiatric evidence is customarily offered and received in aircraft piracy prosecutions. See, e.g., United States v. Coleman, 501 F.2d 342 (10th Cir. 1974); United States v. Greene, 497 F.2d 1068 (7th Cir. 1974); United States v. Bohle, 475 F.2d 872 (2d Cir. 1973).



reputation. Id.

At a second level, the accused cannot be convicted unless he had "an intent to do the act which the statute makes unlawful." See United States v. Weiler, 458 F.2d 474 (3d Cir. 1972). Such a crime cannot be committed accidentally or involuntarily, W. LaFave & A. Scott, supra, § 28 at 201, though one need not actually intend to break the law. An act taken with this type of intent is often termed "purposeful" and classified as a "general intent" crime. See United States v. Weiler, supra; United States v. Moore, 435 F.2d 113, 115 (D.C. Cir. 1970), cert. denied, 402 U.S. 906 (1971).

At a third level of intent, the government must establish beyond a reasonable doubt an "intentional violation of a known legal duty." See, e.g., United States v. Pomponio, 429 U.S. 10 (1976) and cases cited therein; Screws v. United States, 325 U.S. 91 (1945). This category of intent is most often called "willfulness". To act willfully one must do more than violate the law by an intentional act -- one must subjectively intend to break the law.

The mental state required for the federal offense of aircraft piracy falls in the third category. Aircraft piracy is defined in part as:

"any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent . . . ." 49 U.S.C. § 1472(i)(2) (emphasis added).



While the term "wrongful intent" is something of a statutory oddity,<sup>20/</sup> it is obviously the equivalent of "willful". Indeed, although he excluded Zvonko's Rule 12.2(b) defense because "the intent required to commit air piracy is a general, not a specific, intent" (App. 513), Judge Bartels later instructed the jury that "wrongful intent" means "an intent knowingly and willfully to commit the crimes charged" in that a "defendant acts willfully if he voluntarily and intentionally performs acts which he knows are in violation of the law." (App. 601-02).

Judge Bartels' final ruling on the meaning of "wrongful intent", although of no assistance to Zvonko,<sup>21/</sup> was correct. Congress' decision to include explicitly a particular type of mental state for conviction of aircraft piracy is conclusive evidence that the statute requires proof of willfulness.

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<sup>20/</sup> The phrase "wrongful intent" appears nowhere else in the United States Code or, as far as can be determined, in any state code.

<sup>21/</sup> The practical effect of Judge Bartels' flip-flop on the meaning of "wrongful intent" was devastating. Zvonko had sought to present Dr. Diamond's testimony to show the jury that he lacked "wrongful intent" because his "abnormal mental condition" prevented him, in the words of the judge's charge to the jury, from "voluntarily and intentionally performing acts which he knows are in violation of the law." Once Zvonko was denied the right to put on a defense as to "wrongful intent", his conviction was assured since the jury had no expert testimony to aid it in understanding the defense evidence on the willfulness of his conduct.



This construction of the aircraft piracy statute comports with long-standing canons of statutory construction. Where a criminal statute imposing heavy penalties and carrying social opprobrium is silent on intent, a general intent of purposefulness is required. Morissette v. United States, supra; Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960). Consequently, the offenses of interference with a flight crew under 49 U.S.C. § 1472(j)<sup>22/</sup> and carrying dangerous weapons aboard an aircraft under 49 U.S.C. § 1472(1)(1),<sup>23/</sup> which make no reference to intent, require only that the defendant intend the act which is unlawful.

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"Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties, shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life." 49 U.S.C. § 1472(j).

23/

"Whoever, while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight, or any person who has on or about his person, or who has placed, attempted to place, or attempted to have placed aboard such aircraft any bomb, or similar explosive or incendiary device, shall be fined not more than \$1,000 or imprisoned not more than one year, or both." 49 U.S.C. § 1472(1)(1).



See United States v. Lee, 539 F.2d 606 (6th Cir. 1976) (McCree, J.); United States v. Flum, 518 F.2d 397 n.10 (8th Cir. 1975), cert. denied, 423 U.S. 1018 (1975); United States v. Meeker, 527 F.2d 12 (9th Cir. 1975). By contrast, however, the aircraft piracy provision carries an explicit reference to "wrongful intent" and something greater than mere purposeful conduct (general intent) -- willful conduct -- is required. See United States v. Flum, supra, 518 F.2d at 43 (aircraft piracy requires evidence of willfulness).<sup>24/</sup> Otherwise, a clear legislative distinction would be obliterated and the evident congressional will frustrated.<sup>25/</sup>

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<sup>24/</sup> Congress' ability to draw distinctions among the criminal intents required for various federal aircraft offenses is further demonstrated by the gradations of punishment and intent provided in 49 U.S.C. § 1472(1) for carrying weapons aboard an aircraft.

In subparagraph (1) of § 1472(1), Congress proscribes, without an explicit intent requirement, the act of carrying a dangerous weapon on an airplane. The maximum punishment for this offense is one year imprisonment and/or \$1,000 fine.

In subparagraph (2) of § 1472(1), however, Congress imposes much harsher maximum sanctions (five years imprisonment and/or \$5,000 fine) for the same act of carrying a dangerous weapon aboard an aircraft if it is done "willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life".

<sup>25/</sup> The Supreme Court has recognized that when Congress drafted the federal aircraft piracy legislation, it was aware of "different phraseology used in a contemporaneous amendment concerning concealed weapons." United States v. Healy, 376 U.S. 75, 84 (1964).



When drafting the aircraft piracy statute, Congress did not legislate on a clean slate.<sup>26/</sup> The term "wrongful intent" has been frequently equated in judicial decisions with willfulness and an intent to violate a known legal obligation. See, e.g., United States v. Howard, 506 F.2d 1131 (2d Cir. 1974); United States v. Platt, 435 F.2d 789 n.8 (2d Cir. 1970); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393, 397 (1st Cir. 1955); cf. Tucker v. Maher, 497 F.2d 1309 (2d Cir. 1973), cert. denied, 419 U.S. 997 (1974). And the synonymous terms of willfulness and "wrongful intent" are commonly referred to as "specific intent". See, e.g., Devitt & Blackmar, Federal Jury Practice and Instructions, § 14.03 (3d ed. 1977); see also United States v. Bessesen, 445 F.2d 463 (7th Cir. 1971), cert. denied, 404 U.S. 984; United States v. Weiler, supra, 458 F.2d at 475.<sup>27/</sup>

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<sup>26/</sup> A time-honored principle of statutory construction provides that "in the absence of anything to the contrary it is fair to assume that Congress used [a] word in the statute in its common-law sense." Gilbert v. United States, 370 U.S. 650, 655 (1962); see generally 2A Sutherland Statutory Construction § 50.03 at 277-78 (3d ed. 1973).

<sup>27/</sup> The Seventh Circuit has suggested, in dictum and without analysis, that the aircraft piracy statute is a "general intent" crime. United States v. Bohle, 445 F.2d 54, 60 (7th Cir. 1971). The Seventh Circuit's statement can be explained in part as a response to defense counsel's argument that "Congress may have intended to require the specific intent to deprive permanently the owner of his property as is often required in robbery statutes . . . ." Id. The Seventh Circuit,

(Footnote continued)



A decision by this Court that the aircraft piracy statute does not require proof of willfulness would represent a stark departure from settled authority. Aircraft piracy would become the only capital offense known to the law where no such specific intent is required. Moreover, aircraft piracy would become the only criminal offense which expressly specifies an intent without meaning it. To read "wrongful intent" out of the statute would not only violate all canons of construction, it would offend due process of law. Cf. Bouie v. Columbia, 378 U.S. 347 (1964). Judge Bartel's decision to exclude the critical testimony of Dr. Diamond, based on his clearly erroneous interpretation of "wrongful intent", requires reversal of Zvonko's conviction and a new trial.

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(Footnote continued)

27/ however, was not presented with the overwhelming evidence -- based on established principles of statutory construction, the plain language of the statute and substantial judicial precedent -- that "wrongful intent" requires proof of willfulness. In any event, the Seventh Circuit's dictum is clearly erroneous. See United States v. Flum, supra, 518 F.2d at 43.



III.

THE DISTRICT JUDGE ERRED IN DENYING APPELLANTS THEIR  
RIGHT TO A CHARGE ON A LESSER INCLUDED OFFENSE

The offense of interfering with a flight crew member is defined by 49 U.S.C. § 1472(j).<sup>28/</sup> The elements of the offense include (1) presence on an aircraft within the special aircraft jurisdiction of the United States; (2) intimidating or threatening a flight crew member; and (3) threats or intimidation sufficient to interfere with a flight crew member's performance of his duties or to lessen the ability of such member to perform his duties. The offense of aircraft piracy shares two common elements with interference with a flight crew: (1) the offense must be committed aboard an aircraft within the special aircraft jurisdiction of the United States and (2) the use of any form of intimidation in the course of commandeering the aircraft. (App. 593.)

The Basics requested that the District Court instruct the jury on the lesser included offense of interference with the flight crew. The requested charge stated:

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28/ The statute punishes:

"whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties. . . ." 49 U.S.C. § 1472(j).



"If you determine that the defendant Zvonko Basic is not guilty of the offense of air piracy as charged in Count 2, or of air piracy resulting in death as charged in Count 1, either because you have a reasonable doubt as to the element of intent or for some other reason, you must consider whether the evidence justifies a verdict beyond a reasonable doubt as to some lesser offense which is necessarily included within the offense of air piracy. For purposes of this case, these lesser offenses are intimidation of or threatening a flight crew member of an aircraft and imparting false information concerning an attempted air piracy." (App. 359).

Judge Bartels refused to instruct on a lesser included offense because interference with a flight crew is a "different offense" than aircraft piracy and not a lesser included offense. The trial court also reasoned that both crimes required the same "general intent". (App. 513-14). On both grounds, the District Court was clearly erroneous, and the appellants' convictions must be reversed.

First, even assuming that the intent requirements are the same, the defendants' right to a lesser included offense instruction cannot be defeated because of the similarity between the requisite mental intents of the greater and lesser offenses. On the contrary,

"it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973) (emphasis added); see also Rule 31(c), Federal Rules of Criminal Procedure ("an offense necessarily included in the offense charged").



In this context, the only prerequisite to a lesser included offense instruction is that "the elements of the lesser offense must be identical to part of the elements of the greater offense . . . ." United States v. Brewster, 506 F.2d 62, 71 (D.C. Cir. 1974); see also United States v. Thompson, 492 F.2d 359, 363 (10th Cir. 1974). Consequently, the assumption underlying the trial court's second rationale is plainly erroneous.

Second, as we have previously demonstrated, the District Court incorrectly ruled that the aircraft piracy statute, with its requirement of "wrongful intent", was a general intent crime. See pages 39-45, supra. The offense of interference with a flight crew, unlike aircraft piracy, does not require proof of willfulness. The intent requirements are simply not the same. The failure to give the lesser included offense instruction is particularly prejudicial here since "the nature of the [defendants'] intent was very much in dispute at trial." Keeble v. United States, supra, 412 U.S. at 213.

Third, the District Court's first rationale -- the two offenses are "different" -- is irrelevant to whether the appellants were entitled to a lesser included offense instruction. Indeed, as Brewster and Thompson indicate, it is the difference between some elements of the two offenses that supports, rather than defeats, entitlement to the lesser included offense instruction. While these two offenses have some common elements, they also differ in several critical respects. A defendant using intimidation



on an airplane within the special aircraft jurisdiction of the United States may be liable for interfering with the flight crew. However, he obviously cannot be convicted of aircraft piracy unless he also seizes or exercises control of the airplane and does so with "wrongful intent".

The District Court's refusal to give the lesser included offense instruction dealt a damaging blow to the appellants' chances for a fair trial. Julie forcefully denied that she had any intent to seize control of an aircraft, and she presented strong evidence to support this position. The jury could well have believed this evidence and nevertheless concluded that her acts after the seizure, however well-intentioned, had the effect of intimidating a member of the aircraft's crew. Moreover, even had the jury found that Julie boarded the plane intending to help Zvonko throw leaflets from the windows -- yet not intending to seize the aircraft -- it could have concluded that her actions did not constitute participation in the seizure or conspiracy. On the evidence before the jury, therefore, Julie might have been acquitted of air piracy, yet convicted of the lesser offense. Julie was entitled to a lesser included offense instruction.

Likewise, Zvonko presented sufficient evidence of mental distress for the jury to conclude that he was incapable of forming a "wrongful intent". With the intent element lacking, the jury nevertheless could have found Zvonko guilty of interference with



the flight crew, yet not guilty of aircraft piracy.<sup>29/</sup> In Zvonko's case, the absence of a lesser included offense instruction was particularly crippling to his defense. Since at least one of the elements of aircraft piracy ("wrongful intent") remained in doubt, but Zvonko was probably guilty of some offense, "the jury [was] likely to resolve doubts in favor of conviction." Keeble v. United States, supra, 412 U.S. at 213.

#### IV.

#### JULIE BUSIC WAS DENIED A FAIR TRIAL BY EGREGIOUS JUDICIAL AND PROSECUTORIAL MISCONDUCT

The events surrounding this trial were the focus of international attention. The trial itself was monitored daily by the media, and the courtroom was packed week after week. Experienced counsel represented the prosecution and defense.

The trial, however, was a lopsided affair. For whatever reason, the trial judge abandoned his constitutional duty of fair and impartial stewardship over the trial and became an advocate. The judge repeatedly demeaned defense counsel in the presence of the jury and prejudicially interfered with crucial

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<sup>29/</sup> Of course, acquittal of the greater offense and conviction on the lesser offense would have been far more likely if the trial court had not erroneously refused to admit Dr. Diamond's psychiatric testimony and to instruct on the defense of "abnormal mental condition". See pages 33-45, supra.



testimony.<sup>30/</sup>

Unchecked by the partisan trial judge, government counsel sharply departed from acceptable standards of legal advocacy.<sup>31/</sup> Despite an explicit limiting instruction, the overzealous prosecutor in his closing argument used evidence against Julie which had been admitted only against Zvonko. The prosecutor openly charged that the defense was fabricated and the defendants were lying. Undaunted, he pressed on, misrepresenting crucial testimony and offering his opinion about Julie's guilt.

Standing alone, the conduct of either the trial judge or the prosecutor would require reversal. In combination, however, there can be no doubt that Julie was denied a fair trial. Her conviction must be reversed.

A. The Trial Judge Demeaned Defense Counsel  
And Disparaged Crucial Testimony

The trial judge is expected to intervene during the examination of witnesses when necessary to avoid repetition and confusion. He is not permitted, however, to involve himself to the point where he infringes on the role of the jury and counsel

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<sup>30/</sup> A sampling of the trial court's improper remarks is set forth in Appendix C of this brief.

<sup>31/</sup> A representative selection of the prosecutor's prejudicial comments is set forth in Appendix D of this brief.



or suggests his view about crucial testimony and the defendants' guilt. When this line is crossed, a conviction must be reversed. United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973). Thus, it is improper for a trial judge to ask too many questions and usurp the role of counsel, United States v. Cuevas, 510 F.2d 848, 850 n.3 (2d Cir. 1975); to interrogate or interrupt important witnesses and thereby affect the jury's perception of key testimony, Anderson v. Great Lakes Dredge & Dock Co., 509 F.2d 1119 (2d Cir. 1974); United States v. Fernandez, 480 F.2d 726, 738 (2d Cir. 1973); United States v. Nazzaro, supra; United States v. Guglielmini, 384 F.2d 602, 604 (2d Cir. 1967); or to interrupt or criticize defense counsel so often that he discredits the defense and contaminates the jury's verdict, United States v. Cassiagnol, 420 F.2d 868, 879 (2d Cir.), cert. denied, 397 U.S. 1044 (1970); United States v. Guglielmini, supra, at 604-05; see also Anderson v. Great Lakes Dredge & Dock Co., supra; United States v. Nazzaro, supra, at 311.

Judge Bartels thoroughly involved himself in the examination of witnesses and the argumentation of counsel. This involvement, however, was reserved only for defense testimony and defense counsel. The convictions must be reversed. United States v. Nazzaro, supra.

The trial court engaged in caustic attacks on defense counsel throughout the course of the trial (Appendix C 3, 6-7 (hereinafter "App. C")). With the jury listening, Judge Bartels



often belittled objections of defense counsel by curtly refusing to listen to the grounds for the objections (App. C 1, 4), or ridiculing them (App. C 2-3, 4-5, 10-11). This behavior, parodying legitimate objections and refusing to listen to others, did more than decide the single issue presented by the objection. It left the unmistakable impression that defense counsel were raising frivolous issues and acting in bad faith. The judge added to the impression of defense impropriety by flatly accusing counsel, in front of the jury, of wasting time (App. C 8, 10, 18-19), trying to bring in irrelevant material (App. C 5-6, 8, 17), disobeying evidentiary rulings (App. C 2, 5-6, 8-9, 22), and interrupting the proceedings (App. C 10-12, 21). Each time the rebuke of counsel was reproachful and demeaning.<sup>32/</sup> The judge's conduct was at least as prejudicial as that which led to reversal in Anderson, supra; Cassiagnol, supra; and Guglielmini, supra.<sup>33/</sup>

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<sup>32/</sup> The District Judge's persistent attack, of course, was not limited to Julie Busic's counsel. All the defense lawyers shared in the obloquy. The impression of impropriety by one member of the defense affected all the attorneys, both because of the jury's natural tendency to lump together all members of the defense and because of the persistence of the prosecution in tying all the defendants together. (T. 5036).

<sup>33/</sup> Equally demeaning and special was the manner in which Judge Bartels destroyed the summation which Matanic's attorney attempted to present. See Brief for Appellants Matanic and Pesut.



The most important evidence in Julie Busic's behalf was her own testimony. By his cross-examination, interruptions, and unnecessary remarks, the trial judge unfairly destroyed the credibility of certain parts of this testimony and reduced the impact of others. A few examples tell the story.

In its summation, the government forcefully argued that Julie's role in bringing the hijacking to a close evidenced her complicity in the hijacking itself (T. 5337). This powerful argument was possible for only one reason. As Julie began to discuss her role in bringing the hijacking to a close, the judge interrupted and turned the direct examination into a scathing cross-examination by the court. (T. 3624-28). When defense counsel desperately attempted to bring out testimony which the judge's brutal examination had missed, he was brusquely told, "We have to really proceed." (Id.)

Likewise, when Julie attempted to explain how she reacted when her husband first mentioned dropping leaflets from a plane, the court interrupted and once again took over the examination (T. 3586-93). During the course of the court's examination, the judge managed to insult defense counsel and convey to the jury his impression of this important testimony. The Judge's questioning clearly indicated his belief that Julie's testimony was not credible.

During the government's cross-examination, the trial judge again bored in on Julie's testimony. As the government



was questioning Julie about her role in carrying material aboard the aircraft, Judge Bartels joined in with his own intense and hostile cross-examination. (T. 3680-82). He focused on Mrs. Busic's statement that she had originally believed her husband intended to move to the West Coast via Chicago. The judge left no doubt in anyone's mind that he disbelieved Mrs. Busic. These incidents necessarily gave the jury the "impression of some sort of partnership between the prosecution and the judge." United States v. Fernandez, 480 F.2d 726, 737 (2d Cir. 1973).

In other instances when Julie was giving critical testimony, the judge interjected a series of his own questions which, while not hostile, simply nullified the effect of her statements. For example, as trial counsel began to elicit information about conversations Julie had with passengers on the plane, the judge interrupted with four pages of irrelevant questions. (T. 3608-11; see also T. 3611-14). The thrust of counsel's presentation was destroyed.

The trial judge also interrupted and made unnecessary comments attacking the relevance of very important exculpatory testimony. To be convicted of aircraft piracy and the related charges in the indictment, the jury had to find beyond a reasonable doubt that Julie Busic had a "wrongful intent" to seize control of the aircraft. It was necessary for the jury to find that Julie subjectively intended to seize a plane illegally.



Thus, Julie's direct testimony regarding her intent was absolutely crucial. But whenever Julie started to testify about her thoughts, feelings, and state of mind, the District Judge cut her off and erroneously indicated to the jury that the testimony was irrelevant.

At one point, when Julie was about to describe her feelings about her husband's decision to leave New York for Chicago, the trial judge summarily cut her off. (T. 3564). As Julie began to indicate her thoughts at the moment the hijacking occurred, the government objected and the Court responded: "No, no. Strike that out. Just say what happened." (T. 3599).

When Julie began to relate her concern for the welfare of the passengers, Judge Bartels remarked that such concern was "immaterial" and that "what you wanted to do is irrelevant." (T. 3606; see also T. 3605 and T. 3632). When trial counsel attempted to explain, he was chastised and Julie had to ask the judge for permission to proceed. (Id.) The judge then told her to testify only about what she did and what she observed. (Id.) Thus, the trial judge severely derogated Julie's testimony on this central issue.

Judge Bartels was aware of the prejudice lurking in his trial conduct. He made two attempts to instruct the jury to ignore both his remarks and his admonitions to counsel. But curative instructions "may offset only brief or minor departures from strict judicial impartiality." United States v. Nazzaro, 472 F.2d 302, 311-12 (2d Cir. 1973). The "departures" in this



case were major ones. The guilt or innocence of Julie Basic rested almost entirely upon the jury's evaluation of her credibility and the force of her testimony. However, by his prosecutorial attacks on her credibility, his interference with vital testimony, and his condemnation of defense counsel, the trial judge signaled the jury what verdict to return.

This judicial conduct is totally unacceptable. "The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word of intimation is received with deference and may prove controlling." United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970), quoting Quercia v. United States, 289 U.S. 466 (1933). Julie Basic was entitled to a fair trial presided over by an impartial judge. Since she did not receive one, her conviction must be reversed.

B. Julie was Denied a Fair Trial by the Prosecutor's Improper Use in Closing Argument of Inadmissible Evidence and References to a Fabricated Defense

In Appendix D to this brief, we have set forth excerpts from the prosecutor's closing argument. These statements were much more than hard-hitting. They were foul blows and unworthy of a government representative. See, Berger v. United States, 295 U.S. 78, 88 (1935).

1. The Prosecutor Violated Limiting Instructions and Argued From Inadmissible Evidence

The government's case against Julie relied heavily on an alleged statement by Zvonko that he had told Julie that a



package stored in their closet was "dangerous." (T. 4559). Zvonko denied having told Julie about a dangerous package and denied having made such a statement. (T. 3151). Thus, the only evidence that Zvonko told his wife about a dangerous package was an out-of-court statement made after the conspiracy ended. The Judge properly gave the jury two limiting instructions to the effect that Zvonko's out-of-court statement was admissible only against Zvonko and no one else. (T. 4561, 4564).

In his overwhelming zeal to secure a conviction, the prosecutor could not be bothered with such "technicalities" as limiting instructions. He used this evidence, inadmissible against Julie, three times in summation. (T. 5377-5377a, T. 5392, 5441-5442). And two of these times it was directed only at Julie.<sup>34/</sup>

"And I might add just for the sake of completeness, with respect to Mrs. Basic, Mrs. Basic, according to what Mr. Basic told Agent Strand, knew that there was a dangerous substance in her apartment and I suggest to you, ladies and gentlemen, that you saw Mrs. Basic and I ask you how far do you think someone would get, someone like her husband, if he tried to keep dynamite in her apartment for three months, part of the time in her closet without her knowing it? And further than that, how likely do you think it is that when Mr. Basic told Mrs. Basic 'Now, look Julianne, don't touch

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<sup>34/</sup> The prosecutor repeatedly used Zvonko's statement against all the defendants. The trial judge was forced to give another limiting instruction about one such instance, but he did not refer to Julie. (T. 5573-5574).



that because it is dangerous.'

"Is that all Mr. Basic told her? That is all he admitted to telling her to the F.B.I. Do you think that Mrs. Basic was in doubt as to what her husband was storing in the apartment?" (T. 5441-5442; emphasis added).

The most important part of Julie's defense was her testimony that she did not believe her husband would commit a violent act and that she had no idea he was constructing a bomb. It was this critical testimony that the prosecutor undermined with repeated references to inadmissible hearsay statements which, in fact, had been denied by direct testimony.

In White v. United States, 294 F.2d 952 (9th Cir. 1961), the Ninth Circuit held that it was prejudicial error for a prosecutor to violate a limiting instruction during his summation. In circumstances almost identical to those here, the court reversed the conviction. More recently, this Court reversed a conviction because the prosecutor's summation implied that impeachment testimony was affirmative evidence. United States v. Torres, 503 F.2d 1120, 1126 (2d Cir. 1974). The misconduct in this case is even more egregious since the inadmissible testimony was not even given by the person against whom it was used. On the basis of this grossly improper argument alone, Julie's conviction must be reversed.



2. The Prosecutor's Outrageous References to  
A Fabricated Defense Require Reversal

In United States v. White, 486 F.2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974), this Court held that it is improper for a prosecutor to accuse the defense with being fabricated or the defendant of lying. See also United States v. Bivona, 487 F.2d 443 (2d Cir. 1973). In this case the government prosecutor committed both errors time and time again. The only appropriate sanction is reversal.

After making the improper and erroneous comment that Zvonko "admitted before you under oath on the witness stand his guilt 100 per cent" (T. 5341), the prosecutor sought to explain to the jury Zvonko's motive for testifying:

"He testified because he wanted to exculpate his co-defendants.

\* \* \*

"He's got to come up with something that is going to sound as plausible as he can . . . ." (T. 5345, 5347).

When Zvonko contradicted the testimony of an agent regarding post-arrest questioning, the prosecutor told the jury that the defendant's testimony was "simply untrue," and he attempted to bolster the agent's testimony. (Appendix D of Appellant's Brief at 2) (hereinafter "App. D"). Again, and again, and again, the prosecutor accused the defendants of lying. (See, e.g., App. D 1). In one of his typical flights of rhetoric, he stated:



"I suggest to you that you couldn't tell that story to a three year old and have that little baby believe it. Why did Mr. Basic tell that nonsensical story?" (App. D 1-2).

The prosecutor simply could not confine himself to pointing out what he believed were inconsistencies in defense testimony. His improper conduct severely prejudiced Julie since her most crucial testimony was corroborated by Zvonko. He accused Zvonko of telling "nonsensical" lies and of doing so to protect Julie.

"Now, try as he might to exculpate the co-defendants, I suggest to you that nevertheless, as to his wife, the evidence was too difficult for even Mr. Basic's agile mind to overcome."

\* \* \*

"He said it because he was trying to help, to the best [o]f this ability, his wife Julianne." (App. D 3-4). 35/

This is grossly improper argument.

Nor was the prosecutor content to level his barrage of prejudicial remarks solely against Zvonko. He was compelled to tell the jury:

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35/ Not content to argue that Zvonko lied to exculpate Julie, the prosecutor also told the jury that "as a matter of law," Zvonko "came very, very close, if he in fact did not implicate" Julie in the hijacking. (App. D 3). With this statement, he literally took Julie's case away from the jury. The judge ruled that this remark was improper (T. 5463) but never gave a curative instruction to the jury.



"Mrs. Basic remembers what she wants to remember . . . when with regard to things that aren't going to help her no matter whatever she knows about them or not, she tells you she doesn't remember." (App. D 5).

The prosecutor kept up his torrent of abuse, charging Julie of being "manipulative" (App. D 6); of playing "cute" (App. D 8); of refusing to make admissions (App. D 5-7); of giving "nonsensical" and "ridiculous" explanations (App. 5-7); and of trying to "score a point with the jury . . . ." (App. D 6). To make sure the jury had not missed his point, he drove it home one more time:

"And now after it's all over, in line with the nonsensical and unintelligent, insulting defense that has been presented in this case, now she says, oh, I did it because I was pregnant." (App. D 7) (emphasis added.) 36/

This disgraceful conduct is unbecoming a representative of the United States government and is far worse than that which has already been condemned by this Court in Bivona and White.<sup>37/</sup>

Julie's conviction must be reversed.

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36/ To cover all bases, the prosecutor not only accused Julie of presenting a stupid defense (T. 5481), but also charged her with not putting on any defense. "Mrs. Basic, I suggest to you, testified but did not offer a defense. She simply did not offer a defense." (App. D 4).

37/ The prosecutor's conduct should also be scrutinized in light of his misrepresentations of the record. He took extreme liberties with the record to argue that Julie considered good morale to be essential to the hijacking (T. 5313); Julie was the most trusted member of the hijacking team (T. 5337); and Julie "introduced" the hijackers to the crew (T. 5297). The last remark was so unsubstantiated that it prompted the trial judge to sustain an objection. (T. 5480).



V.

THE DISTRICT COURT ERRED IN REFUSING TO DISMISS  
FOR LACK OF JURISDICTION COUNT I CHARGING  
AIRCRAFT PIRACY RESULTING IN DEATH

A. The Crime Did Not Occur Within  
Federal Jurisdiction

Before Flight 355 was hijacked, Zvonko Basic constructed a bomb at home and placed it in a locker at Grand Central Station. (T. 2905, 2907). The bomb was removed by members of the New York City Police Department's bomb squad and taken to a disposal area in the Bronx where it exploded, killing police officer Brian Murray. In Count I, the Busics were indicted under 49 U.S.C. § 1472(i)(1) for aircraft piracy resulting in the death of Brian Murray. A motion to dismiss Count I for lack of jurisdiction (App. 184-98) was denied. (App. 303-17).

The statute under which the Busics were prosecuted defines aircraft piracy in part as the "seizure . . . of an aircraft within the special aircraft jurisdiction of the United States." 49 U.S.C. § 1472(i)(2) (emphasis added). The jurisdictional provision is defined in terms of an "aircraft . . . in flight . . . ." 49 U.S.C. § 1301(34). Congress has thus sought to protect only a special and limited federal enclave covering aircraft in flight.

It is undisputed that Brian Murray never had any contact with Flight 355. His mortal injuries were inflicted on the ground within the jurisdiction of New York State. He was killed in connection with his routine police duties of investigating a



report of a bomb in a public place that is exclusively subject to the protection of local law enforcement officers.

The important question presented is whether Congress intended the aircraft piracy statute to reach a homicide not occurring within the special federal jurisdictional enclave. We respectfully submit that the plain language of the statute, its legislative history, and long-standing rules of statutory construction establish that the Busics, while subject to prosecution under state law, could not be charged under the federal aircraft piracy statute for Brian Murray's death. A contrary conclusion would strike at the heart of federalism and rupture delicate federal-state relations.

B. Congress Did Not Express, and This Court Should Not Infer, An Intent To Extend The Reach of 49 U.S.C. § 1472(i)(1) To A Death Outside The Special Aircraft Jurisdiction

Congress may have power to make a federal offense the construction of a bomb and the placing of that bomb in Grand Central Station. The question here, however, is whether Congress intended to do so under the aircraft piracy statute. See, e.g., United States v. Pizzarusso, 388 F.2d 8, 9 (2d Cir. 1968); United States v. Braverman, 376 F.2d 249, 251 (2d Cir. 1967), cert. denied, 389 U.S. 885. Certainly, the plain language of the statute evinces no such intent. Given the limited reach of federal power to only those areas specifically authorized by Congress, Lockerty v. Phillips, 319 U.S. 182, 187-88 (1943); Cary v. Curtis, 44 U.S.



236, 245 (1845), it cannot be said that Congress has "plainly and unmistakably" made a crime a death outside the special jurisdictional enclave. United States v. Gradwell, 243 U.S. 476, 485 (1917). This is the end of the analysis.

Even assuming that the plain language of the statute is not dispositive, no clear legislative intent to reach the death of Brian Murray outside the narrow special aircraft jurisdiction can be implied here. Under long-standing authority, if Congress intends a criminal statute to extend to events outside the zone of federal jurisdiction, "it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." United States v. Bowman, 260 U.S. 94, 98 (1922). This is particularly so where Congress, by extending the scope of federal criminal law, would impinge upon the normal sphere of state criminal law. Thus, in United States v. Bass, 404 U.S. 336 (1971), the Supreme Court held that the extension of the federal statute prohibiting an ex-felon from possessing or receiving a firearm, to acts not specifically shown to be connected with interstate commerce, was unwarranted.

"Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." Id. at 349 (footnotes omitted).

The important values underlying congressional reluctance to trench upon state criminal jurisdiction -- traditional



concepts of federalism and comity -- are not to be dismissed lightly. As Judge Friendly has warned: "Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds." United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973). These fears have been realized in this case. Up to the eve of trial, federal and state authorities fought a heated, unseemly battle for the right to try these defendants, a dispute which had to be finally resolved by the District Judge after a full hearing. (App. 247-48).<sup>38/</sup>

C. The Legislative History of the Aircraft Piracy Statute Convincingly Negates Any Congressional Intent to Reach This Crime.

The legislative history of this statute is conclusive evidence that Congress was aware of the impact of federal hijacking legislation on sensitive federal-state relations and had no intention of reaching a homicide resulting within traditional state jurisdiction.

Air piracy was first made a federal criminal offense in the 1961 amendments to the Federal Aviation Act of 1958. Pub. L.

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<sup>38/</sup> New York District Attorney Robert Morgenthau appeared before the District Court to express New York's intense interest in prosecuting these defendants for the death of a local police officer. If the federal court properly exercised jurisdiction over Count I, New York will be forever deprived of the opportunity of prosecuting the appellants for the death of Brian Murray. N.Y. Crim. Proc. Law § 40.20, subd. 2; see Abraham v. Justices of the New York County Supreme Court, 37 N.Y.2d 560, 376 N.Y.S.2d 74 (1975).



No. 87-197, 75 Stat. 466. Aircraft piracy was defined as the wrongful seizure "of an aircraft in flight in air commerce." Thus, from the advent of federal jurisdiction over aircraft piracy, Congress required that the seized aircraft be "in flight."

The 1961 amendments were considered by the Interstate and Foreign Commerce Committee of the House of Representatives. The Committee Report clearly indicates that the new legislation was only intended "to provide for the application of Federal criminal law to certain events occurring aboard aircraft -- in particular, such acts as aircraft piracy, murder . . . ." H. R. Rep. No. 958, 87th Cong., 1st Sess. 1 (1961) (emphasis added). The purpose of the new legislation was to create federal jurisdiction only over those crimes for which state laws were unsuited, viz. those crimes occurring aboard aircraft. Id. at 3; see also S. Rep. No. 694, 87th Cong., 1st Sess. 3-4 (1961). There was simply no need, and Congress did not intend, to reach those crimes occurring elsewhere. Congress was particularly sensitive to notions of federalism. H. R. Rep. No. 958, supra at 5; see also id. at 3-4; S. Rep. No. 694, supra at 3-4.

Over a span of 16 years -- from the initial exercise of federal criminal authority over air piracy -- Congress has periodically revisited this legislation. At no time has there been even the slightest suggestion that the national legislature intended to insinuate the federal government into the traditionally local



police problems of states and their municipalities. It borders on arrogance to suggest that any act, somehow related in time with a hijacking, can be converted for that reason alone into a federal law enforcement concern. This was clearly not the design of Congress in exercising limited authority in this field. Quite the contrary, Congress expressly preserved, and this Court must protect, "the sensitive relation between federal and state criminal jurisdiction." United States v. Bass, supra, 404 U.S. at 351. The convictions on Count I must be reversed with directions to dismiss the indictments.

#### CONCLUSION

Appellants were charged with several of the most serious offenses in the federal criminal code. Both admitted involvement to one degree or another in the events giving rise to their arrests. The question for the jury therefore was the knowledge and intent of Zvonko and Julie before and during the hijacking. Throughout the trial, however, the jurors' minds were systematically poisoned in an unprecedented manner by a partisan trial judge and an exceptionally overzealous prosecutor bent on convicting these unpopular defendants.

Appellants' convictions are a blight on the fair administration of the federal criminal justice system. One of the major and most damaging pieces of evidence against Julie was unlawfully seized and used by the prosecutor to impugn the credibility of her testimony that she lacked prior knowledge about



the hijacking. Julie's defense to aircraft piracy was dealt a lethal blow by the trial court's indefensible refusal to charge the jury on the lesser included offense of interference with the flight crew. Similarly, notwithstanding powerful evidence of Zvonko's "abnormal mental condition" and the proffered testimony of an eminent forensic psychiatrist, Zvonko's Rule 12.2(b) defense -- his only realistic basis for acquittal of aircraft piracy -- was jettisoned on the basis of the trial court's clearly erroneous interpretation of the critical "wrongful intent" element of the statute. Finally, appellants were forced to defend against murder charges in a forum never intended by a Congress sensitive to the corrosive impact of federal encroachment on local criminal jurisdiction.

For the foregoing reasons, we respectfully request that appellants' convictions be reversed.

Respectfully submitted,

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Julienne Busic

Dated: September 30, 1977



A P P E N D I X



## APPENDIX A

### The Professional Qualifications of

Bernard L. Diamond, M.D.

Boalt Hall School of Law

#### Professional Experience

1. Professor of Criminology and Law, University of California, Berkeley, 1964-present
2. Clinical Professor of Psychiatry, Medical School, University of California, San. Fran., 1968-present
3. Acting Dean, School of Criminology, University of California, Berkeley, 1969-1970
4. Private Practice, psychiatry and psychoanalysis, San Francisco, California
5. Psychiatrist, U.S. Army Medical Corps. (Lt. Colonel), 1940-1945

#### Professional Associations and Committees

1. Chairman, Committee on Psychiatry and Law, American Association of Psychiatry, 1962-1963
2. California Special Commission on Insanity and Criminal Offenders, 1960-1963
3. Fellow, American Association for the Advancement of Science
4. Diplomate in Psychiatry, American Board of Psychiatry and Neurology



Member American Psychiatric Association  
American Ortho-Psychiatric Association  
American Sociological Association  
American Psychoanalytic Association  
International Psychoanalytic Association

#### Awards

- 1976 -- Golden Apple Award of American Academy of Psychiatry and Law
- 1972 -- Mount Airy Foundation Gold Medal Award for distinction in psychiatry
- 1968 -- Isaac Ray Award of American Psychiatric Association for advancement of psychiatry and law
- 1964 -- J. Elliot Royer Regents of University of California for advancement of psychiatry

#### Education

- 1. University of Michigan, Training in Psychiatry
- 2. University of California, Berkeley and San Francisco, M.D., 1939
- 3. University of California, Berkeley, A.B.

#### Publications

##### A. Law Journals

Diamond, "The Psychiatric Prediction of Dangerousness," 123 U. Penn. L. Rev., 439 (1974)

Diamond, "The Scientific Method and the Law," 19 Hastings L. J., 179 (1967)

Diamond and Platt, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey," 54 Cal. L. Rev. 1227 (1966)



Diamond and Louisell, "Law and Psychiatry: Detente, Entente, or Concomitance," 50 Cornell Law Quarterly, 217 (1965)

Diamond and Louisell, "The Psychiatrist as an Expert Witness: Some Reminations and Speculations," 63 Mich. L. Rev. 1335 (1965)

Diamond, "Preparing Psychiatric Testimony," California Criminal Law Practice I, 611 (1964)

Diamond, "From M'Naughten to Currens, and Beyond," 50 Cal. L. Rev. 189 (1962)

Diamond, "Criminal Responsibility of the Mentally Ill," 14 Stan. L. Rev., 59 (1961)

B. Others

Diamond, "Criminal Responsibility of the Mentally Ill," International Encyclopedia of Psychiatry, Psychoanalysis, and Psychology, University of California, Berkeley

Diamond, "Current Conflicts in the Legal Definitions of Insanity," Journal of Correctional Psychology

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112 The American Journal of Psychiatry, 651 (1956)

Diamond, "The Simulation of Sanity," 2 The Journal of  
Social Therapy (1956)



APPENDIX B

BERNARD L. DIAMOND, M.D.

University of California

Berkeley, CA. 94720

March 15, 1977

Mr. Michael E. Tigar,  
Williams & Connally  
1000 Hill Bldg.  
Washington, D.C. 20006

Dear Mr. Tigar,

The following is a summary of my tentative evaluation of the mental state of ZVANKO BUSIC:

I examined Zvanko Busic at the Metropolitan Correctional Center, New York City, on December 14 and 15, 1976 and on February 14, 1977. I also interviewed his sister, Mrs. Zdravko Logarusic, on December 14, 1976, and his wife, Mrs. Julianne Busic, on February 14, 1977. My opinion of the mental state of Zvanko Busic is based upon my examination of the defendant, upon the information he provided me, and upon the information related to me by his sister and his wife.

It is my opinion that Zvanko Busic was in an abnormal mental state on September 10, 1976 when he is alleged to have committed air piracy, homicide, and other criminal acts. I believe his abnormal mental state existed previously, at least since January 1976 or before, and that it has persisted until the present time. It is also my opinion that this abnormal mental state was of such a quality and degree that it prevented the defendant from exercising the ordinary, reasonable and rational powers of free-will, choice and decision that constitute the intent required by the definitions of the crimes of which he is charged. Hence, I conclude that Zvanko Busic lacked the capacity for such criminal intent.

I am of the opinion that this abnormal mental state was not caused by mental disease, illness or defect. I do not find the defendant insane or mentally ill in any sense of those terms. Psychiatric examination revealed intact sensory, perceptual, memory and intellectual functions. Volitional functions are, however, disturbed; but not, I believe, as a result of mental illness. There were no hallucinations, delusions or other psychotic manifestations elicited.

Zvanko Busic talked freely to me with emotional responses of great intensity but always appropriate to the content of his thoughts. Consistently throughout my discussions with Busic he took full and sole responsibility for every detail of the planning and execution of the skyjacking. He describes the other participants as knowing nothing, of simply responding to his orders, blindly following his instructions at all times, and having no real comprehension of what was happening until it actually happened. He was, however, somewhat evasive in response to my inquiries concerning possible European connections who might have known what was planned. He seemed reluctant to allow any blame to fall upon anyone other than himself. Aside from this, Busic impressed me as being very honest, frank, sincere, and willing to communicate all details of his thoughts, behavior, and actions.



It is my opinion that the abnormal mental state of Zvanko Basic was the consequence of prolonged exposure to social and cultural factors which existed since his early childhood. These factors, when combined with realistic fears for his own life and safety, his belief that his own assassination was imminent, caused him to become fanatically obsessed with the accomplishment of what he perceived as a necessary act of patriotic, nationalistic service to his ethnic group, the Croats, in their struggle against Serbian domination. He determined in adolescence to devote his life to the rectification of what he believed to be the persecution of his people and the wrongs against his ethnic culture. He regarded the formation of the nation of Yugoslavia as a forced, unnatural amalgamation of the Serbian oppressors with his own Croatian people. At the age of 16 he was asked to join the Yugoslavian communist party. He refused, not because he was against communism, but because he believed the Yugoslavian communists to be wholly dominated by Serbian interests.

Basic emigrated to the United States in December 1969, settling in Cleveland, Ohio. Since then he has devoted himself to furthering the national independence of the Croats. He has pressed the cause of the Croats and tried to reveal what he believed to be the oppression of his people by the Serbs. His European activities often involved considerable risk and he had encounters with the secret police of Yugoslavia, Germany and Austria. In 1971 he was expelled from Austria on one hour notice. He was arrested twice in Cleveland for causing a disturbance at a political meeting. On the second arrest he was found to be carrying a handgun (his life had been recently threatened) and he was fined and the gun confiscated. He had met his American wife, Julianne, in Vienna in 1969 and married her in May 1972 in Germany.

Basic states that he has always been dedicated to peaceful means of pressing his cause: speeches, writing, distributing leaflets and publicizing what he believes to be the true facts of the oppression of the Croatian people. He strongly deplored violence and has long been convinced that violence or any activity which might result in harm to anyone, friend or foe, would be immoral and detrimental to his cause.

For several years he has been aware that he might become the victim of assassination at any moment, at any place, in order to silence his protests. Since at least January 1976 he has been completely convinced that he was in imminent danger, that he would soon be killed. He believed that there was no way of indefinitely avoiding assassination by his political enemies who, he was convinced, would go to any length to silence him. He believed there were Serbian secret agents in the United States as well as in Europe, and that his time was running out. He thought they would not dare an assassination attempt in the presence of his wife who might be a witness against them. Yet, he firmly believed that they would get to him alone eventually and kill him. He estimated his own life expectancy as a year or less.

It was in this frame of mind -- a highly abnormal mental state, in my opinion -- that he determined to perform one last, meaningful, heroic



act for the benefit of the Croatian cause. He felt compelled to devote his remaining life to the accomplishment of an act which would bring the attention of the entire world to the injustices imposed upon his Croatian people. To do this he planned the skyjacking with the sole intention of forcing the skyjacked plane to drop leaflets over various cities. The idea had developed slowly in his mind over a period of months.

Preparations were made to deposit a real bomb with actual explosives in the locker in downtown Manhattan. The plan was to make it appear that the harmless pseudo-bomb which he smuggled onto the plane was an exact duplicate of the real bomb in the locker. He personally bought all of the materials for the construction of both the real and the false bomb, wrote the text of the leaflets, arranged for their translation in to English and French, had them printed, purchased the airplane tickets, and took care of each detail, including the placement of the real bomb in the locker. He insists that none of the men knew anything about what was planned and that they played no part in these preparations. The printer was not informed.

The bomb placed in the downtown locker was constructed by him in such a manner, he believed, that it could be safely disarmed when discovered. There was no timing or other delayed action device. As described by Basic, it was the type of bomb which could only be detonated by someone pushing the switch, causing the bomb to explode but also killing the person pushing the switch. It was constructed in this manner so that the police who found the bomb, at Basic's direction, would believe the bomb on the plane was identical and that the skyjackers were prepared to sacrifice their own lives, if necessary.

At the same time Basic firmly believed that he had constructed the real bomb in such a manner that it could safely be disarmed by the police upon its discovery. He persists, still, in this belief and he is dismayed and remorseful that this bomb resulted in the death of a policeman. He wanted more than anything else to avoid violence and harm to anyone because of his conviction that any harm would tend to discredit his cause. Particularly, he did not want to be, or appear to be, a terrorist or criminal.

The skyjacking, the placement of the bomb in the downtown locker, and all of the complicated preparations were, in my opinion, the acts of a desperate man, in a highly abnormal mental state, acting out of fear and compulsive determination. Believing in the righteousness of his cause and in the imminence of his own death, he felt compelled to plan and perform what was to be one last heroic act: to inform the entire world of the cause of the Croatian people, language and culture. He hoped and believed that if the world were so informed it would thwart any further oppression by the Yugoslavian government and the Serbian groups, who, he believed, controlled that government.

Taking into consideration Zvanko Basic's lifelong social and cultural indoctrination, the social and political circumstances of his



childhood and adolescence, his total preoccupation with the Croatian cause, the belief in the reality threat to his own life, and his obsessive and fanatical determination to perform one last act of value to his people, it seems clear to me that he lacked the mental ability to make the choice or decision to do other than what he did do. In terms of an element of criminal intent implying the power of free-will, choice and decision as exercised by ordinary men, Zvanko Basic lacked, in my opinion, the capacity for such criminal intent. He did what he did out of psychological necessity, not free choice.

I wish to examine and interview Basic at least one more time in order to reach my final conclusions regarding his mental state.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bernard L. Diamond". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bernard L. Diamond, M.D.



APPENDIX C

Representative Prejudicial Remarks by the District Judge

MR. SCHLAM: That's correct.

THE COURT: All right. Now you object because --

MR. TIGAR: I object because the diagram --

THE COURT: Overruled.

MR. TIGAR: (Continuing) -- does not show the  
relation of the two items.

THE COURT: Because I think you have no evidence  
for your objection at all. It's just your opinion. And  
this man is an expert, I take it.

Overruled. (T. 1521)

\* \* \*

MR. TIGAR: But he elicited about what happened.

MR. BERGMAN: There has been testimony about the  
surrender.



THE COURT: You and Mr. Rochman never pay any attention to the rules -- Mr. Rochman, Mr. Rochman, I will take that back because you didn't come here.

MR. TIGAR: I am the offender, your Honor.

THE COURT: No, you're not.

I have ruled, did you understand that?

MR. BERGMAN: All right, okay.

I'm not going to say anything more, your Honor.

THE COURT: Let me see them again, not that I'm going to permit any re-argument. (T. 1750)

\* \* \*

THE COURT: Aren't we going over the same thing again and again. He said he was the silent one. It's the same thing. What's the use of doing this?

MR. ROCHMAN: Would your Honor wish to hear argument at the sidebar?

THE COURT: No, you must know I don't wish to hear argument.

Proceed, proceed. (T. 1704)

\* \* \*

THE COURT: Do you have much more, Mr. Bergman?

MR. BERGMAN: Yes, I do.



THE COURT: I knew you would. (T. 1871)

\* \* \*

THE COURT: Maybe there are inconsistencies, I don't know. But you see, what you are doing, is you are acting in both capacities. You are acting as a witness and saying, didn't you say that to me.

MR. RUDOLF: I didn't act as a witness --

THE COURT: You are wasting time.

We are going to watch you, Mr. Asen on these matters because once before I had a problem. Remember?

MR. ASEN: I think it was a problem with a juror not with me.

THE COURT: We always have problems with jurors when you are here. (T. 1879)

\* \* \*

MR. BERGMAN: May we have a brief sidebar --

THE COURT: No sidebars.

I guess you didn't hear me before.

MR. BERGMAN: A frontbar.

THE COURT: While the jury is here?

MR. BERGMAN: No, the jury could be excused.

THE COURT: It had better be necessary Mr. Bergman.

MR. BERGMAN: I think it is.

THE COURT: I know you do. (T. 1898)

\* \* \*



MR. ROCHMAN: Objection, your Honor.

THE COURT: What is the objection? Overruled.  
Proceed.

MR. ROCHMAN: Would you give me an opportunity to  
state the reasons for the objection?

THE COURT: No, it is unnecessary. Proceed. (T. 2325)

\* \* \*

MR. ROCHMAN: I move to strike the entire testimony --

THE COURT: Overruled. You have an objection to every-  
thing. Is that your objection to all this testimony?

MR. ROCHMAN: It is, your Honor.

THE COURT: Overruled. Now, you don't have to make it  
anymore. I will put it on the record that you are objecting  
to all questions and answers, questions to answers from this  
witness. All right?

MR. ROCHMAN: Yes, your Honor.

THE COURT: Overruled. Proceed. (T. 2328)

\* \* \*

MR. ROCHMAN: Objection.

MR. RUDOLF: Objection your Honor.

THE COURT: Come here. I want to talk to you. You  
can't yell in this courtroom again.



MR. RUDOLF: Your Honor there were three people  
objecting at the same time. (T. 3492)

\* \* \*

MR. RUDOLF: Your Honor, my next witness will be a  
fairly lengthy witness and since it is five after five on  
Thursday afternoon that we break until Monday morning?

THE COURT: Every now and then you do make some good  
suggestions. (T. 3498)

\* \* \*

THE COURT: I object to your objection to Mr. Schlam's  
objection to Mr. Rudolph's objection.

MR. ASEN: Fine, your Honor.

THE COURT: So we can go on ad infinitum. Please sit  
down and forget this nonsense and go ahead with the examination  
of the witness.

MR. RUDOLPH: Thank you, your Honor. (T. 3554)

\* \* \*

BY MR. RUDOLF:

Q How many times all together do you recall speaking  
to your husband from the tower in Paris to the airplane in Paris?



A I would say maybe 3 to 5 times, 3 or 4 times.

Q And what were the discussions, what was the substance of those conversations?

THE COURT: I thought we just had it. I thought we just had the substance.

MR. RUDOLF: I think we had part of the substance, your Honor.

THE COURT: No, you stick to the facts. I don't want any great declaration of those facts that are not relevant.

MR. RUDOLF: I am merely trying to bring out the substance.

THE COURT: Trying to tell you what the rules of evidence are. And you try to comply.

MR. RUDOLF: Absolutely. (T. 3631)

\* \* \*

THE COURT: 403.

MR. TIGAR: I don't think that applies here.

THE COURT: I think 403 does and I will exclude --

MR. RUDOLPH: May I just show your Honor --

THE COURT: No.

I've got your point.

You never stop, do you?



Well, you are going to stop now. I've got your point.  
I have ruled.

MR. RUDOLPH: Your Honor, it seems to me that  
this is a critical piece of evidence for my defense.

THE COURT: Do you understand English?

MR. RUDOLPH: Yes, your Honor.

THE COURT: Well, I have ruled. No more argument  
on it.

MR. RUDOLPH: All right.

THE COURT: Now, you understand?

MR. RUDOLPH: I understand.

THE COURT: I don't care for that sort of thing.

MR. RUDOLPH: Your Honor, I am trying to have  
my record complete.

THE COURT: You made your record two or three  
times and you come back again and again.

MR. RUDOLPH: All I am trying to do is to do my  
job.

THE COURT: You are doing more than that. You  
are interfering with me.

MR. RUDOLPH: That is certainly not my intention.

THE COURT: You take my ruling and you take it.  
That's it.

MR. RUDOLPH: Very well.

(End of sidebar.) (T. 3783)

\* \* \*



THE COURT: Sustained. Now, Mr. Elefant, you must now listen to the Court's instructions. Now, question him about this event.

Q Did you belong --

THE COURT: No, no. You're going to obey my instructions. I mean I don't give them so they can be evaporated so that you can completely ignore them.

(T. 3825)

\* \* \*

MR. SCHLAM: Objection, your Honor.

THE COURT: I don't know why this is relevant at all.

MR. ELEFANT: I think this is very relevant. And as soon as you hear the answer -- (T. 3834)

\* \* \*

MR. SCHLAM: Your Honor, what possible relevancy --

THE COURT: None. None. It will not be admitted into evidence. Let's waste no time.

MR. ELEFANT: I respectfully except

THE COURT: All right. None.

MR. ELEFANT: May I be heard on this?

THE COURT: Never. Proceed. (T. 3841)

\* \* \*



Q Well, did there come a time that you were asked questions --

THE COURT: This is the same --

MR. ELEFANT: May I just finish the question?

THE COURT: If you are going to ask how long it was and how did you feel and all those sort of things, that is out.

MR. ELEFANT: No.

Q Were you asked by Assistant District Attorney named Tannenbaum, questions?

MR. SCHLAM: Objection, your Honor.

THE COURT: Sustained.

Q When was the last time you had slept --

THE COURT: Sustained.

MR. SCHLAM: Objection.

THE COURT: Sustained. Now, we went over that. You understand what I am talking about and in spite of that, you insist on proceeding along this line of questioning. Now, you must obey my rulings. This doesn't deprive you of your opportunity. This is not the way to do it.

\* \* \*

MR. ELEFANT: I have nothing further.

THE COURT: Wait a minute. I think, in order to accelerate the trial, I will permit you to ask when Mr.

Schlam objected. Now, don't take too much time. (T. 3948-49)



\* \* \*

MR. ELEFANT: Can we have when, Judge?

Your Honor, I am going to --

THE COURT: I don't understand these interruptions. You have an opportunity on redirect to bring out any gaps you think should be brought out.

Proceed.

Or should be filled in, not brought out. (T. 3960)

\* \* \*

THE COURT: I can't afford these brief recesses.

MR. ROCHMAN: I just want to see what witnesses are here.

THE COURT: You see them now. I can't afford it. We have to go ahead.

MR. ROCHMAN: Whatever your Honor wishes.

THE COURT: I'm sorry. But the jury has been brought here. They're delayed and then we have a side bar and another recess. That isn't the way I try cases.

MR. ROCHMAN: I'm sorry. We also may need some -- is he here? (T. 4030)

\* \* \*

MR. ROCHMAN: I think the appropriate time is to do it right now.

THE COURT: As to what certain Croation words mean?



MR. ROCHMAN: Very brief, your Honor.

THE COURT: You know, I am beginning to wonder what your definition of very briefly is. (T. 4224)

\* \* \*

Q When you got on the plane, who did you give your leaflets to?

When you got on the plane, to whom did you give your package of leaflets?

MR. ROCHMAN: Your Honor --

THE COURT: You are overruled. Please sit down. I am going to ask a few questions.

You have interrupted cross-examination again and again, and you must let the cross-examiner pose questions, and the Court.

MR. ROCHMAN: I just want to point out there are two different vehicles --

THE COURT: If he doesn't understand it, I am sure he will make it clear.

MR. ROCHMAN: Thank you. (T. 4302)

\* \* \*

MR. BERGMAN: It is not responsive --

THE COURT: Now, just a minute.

Now, what is your question, Mr. Bergman?



Q Did you ask him if he was willing to waive his rights again?

A I asked if he understood his rights and if he was willing to go on --

Q Agent Davidheiser, that is not the question --

MR. SCHLAM: Your Honor, I must object.

MR. BERGMAN: Your Honor, if he doesn't answer we are allowed to interrupt.

THE COURT: Don't interrupt --

Q I ask you again, Agent Davidheiser --

THE COURT: You are interrupting me too.

MR. BERGMAN: I am sorry. I didn't mean to.

(T. 4355)

\* \* \*

MR. ROCHMAN: Objection to the form of the question.

THE COURT: I will permit it.

Mr. Rochman, this is cross-examination. I do not know how many times you stood up, but in far more cases than -- we can't constantly have these interruptions. You can get up too, Mr. Tigar, and make the same objections if you want.



MR. TIGAR: I was going to point out that this is direct examination.

THE COURT: You are one hundred percent right. I accept the correction. I am sorry. (T. 4484)

\* \* \*

MR. TIGAR: I am sure your Honor misspoke.

\* \* \*

MR. SCHLAM: Excuse me, your Honor. I'm going to object to any outburst from the audience.

THE COURT: Was there some outburst from the audience?

MR. ROCHMAN: If we are going to do something, can we do it at side bar?

THE COURT: Wait a minute. If I hear that again, I'll clear --

MR. ROCHMAN: I don't understand that your Honor heard anything.

THE COURT: Well, I heard a noise but I didn't -- all right. We will take a recess. Just five minutes. We will take a recess.

(The following occurred in the absence of the jury).



MR. SCHLAM: Just a second. I object to Mr. Rochman attempting to communicate with the jury just now about that outburst which he said did not happen. That is unbelievable, in my judgment.

MR. ROCHMAN: I did not. Do you want me to respond to it? I wanted to tell your Honor.

THE COURT: Who is it back there that had the outburst?

MR. SCHLAM: This woman in the blue dress with the white hair in the second row and the woman who is next to her.

THE COURT: All right. You're out, leave immediately.

WOMAN: Didn't say a thing. Didn't say a thing.

THE COURT: Are you all Croations on this side?

WOMAN: Not me, I'm an American.

THE COURT: Who is Croation? Please sit down, Mr. Tigar. I can handle this.

MR. TIGAR: I'm objecting to your Honor's form of proceeding.

THE COURT: I don't care if you object or not. Please sit down.

MR. TIGAR: Thank you, your Honor.

MR. ROCHMAN: I am, your Honor --



THE COURT: Who is Croation in this audience?  
One, two -- yes. Do you understand that you cannot possibly  
speak during this trial or attempt to influence the jury or  
any witness? Do you? If you don't, you're going to have  
to leave. Now, who made that, who of you want to admit to  
making that noise?

WOMAN: I didn't make a noise.

THE COURT: Did you say anything or whisper  
anything?

MR. SCHLAM: It was a laughing sound, your Honor.

WOMAN: No. I just said I just said --

THE COURT: We don't need you to say anything  
out loud.

WOMAN: I apologize.

THE COURT: If you want to listen to this trial,  
that goes for all of you.

WOMAN: I'm sorry.

THE COURT: Nobody will say a word or make any  
noise. That is not the way we conduct a trial in America.  
And it won't happen again, or I'll clear every Croation out  
of here. Now, you can object and put your objection down.  
We are not going to have -- we'll have an American trial.  
We are not going to have a trial where others can get up  
and make statements or rather without getting up can make  
noise.



Next? Bring in the jury.

MR. ROCHMAN: Excuse me. May we have -- I would object if there is -- if there is a sound, it seems to me, the appropriate thing to do is to ask your Honor for side bar, point it out to your Honor, deal with it outside the presence of the jury.

THE COURT: No. How I know how to handle it. The appropriate thing for me to do is call out the jury and the appropriate thing for you is not to communicate between the audience and the jury. Take your place.

MR. TIGAR: Is it appropriate for me to make an objection now, your Honor?

THE COURT: Yes. Put your objection on the record. I don't know what it is or what it can be, but I won't be surprised. Put it on. What is it?

MR. TIGAR: I object, first of all, to your Honor's tone of voice.

THE COURT: Well, I object to your constantly objecting. Regardless of whether there is a basis for it. or not.

MR. TIGAR: My objection is, your Honor, at the present time that the audience, during this very difficult case has been it seems to me, extraordinarily attentive.



THE COURT: Now, Mr. Tigar, I'm not interested in your opinion. I sit here and see a lot of things you don't see and I hear things you don't hear and you're an advocate. I'm impartial. You're not. And I'll make the decisions and I don't agree with you at all, that they have been extraordinarily quiet or orderly. Now please sit down. Bring in the jury. (T. 4496-4500)

(jury present)

\* \* \*

THE COURT: Ask him whether it was in English or Croation?

MR. ROCHMAN: With all due respect, that is exactly the point.

THE COURT: It is the point that I want you to bring out. We are not creating false issues here. The question is did he understand Croatian when he posed those questions. Did he pose them in Croation and did Pesut answer. We are not talking about German, Latin or Italian.

MR. ROCHMAN: I respectfully except.

THE COURT: I know you do. You proceed according to my instructions. (T. 4543)

\* \* \*



MR. SCHLAM: Your Honor, we have nothing further.

MR. ROCHMAN: I have an application.

THE COURT: No, you do not. Please cross-examine.

MR. ROCHMAN: We had agreed -- I respectfully except.

THE COURT: We will take a little recess, but we will stay here.

MR. ROCHMAN: I except to that procedure.

THE COURT: There is no necessity for it. I will explain it to the jury. Please examine it and we will give you a five minute recess.

MR. ROCHMAN: I respectfully except.

THE COURT: Ladies and gentlemen, it is the law that when a Government witness testifies, the Government must give to counsel for the defendant any statements that were made by that witness outside of Court, so that counsel may have those statements to cross-examine the witness on. That was done now. That is called 3500 material.

You have it, look at it, so you may do your cross-examination. We will wait five minutes. It is only three pages. (T. 4711)

\* \* \*



THE COURT: Let the record indicate that Mr. Rochman left the courtroom at 12:10 to go into the witness room, which the Clerk opened up, so he may study the 3500 material for the purposes of cross-examination, which material consisted of three or four pages. In the meantime the Court and the jury stayed in the courtroom waiting for Mr. Rochman.

(Pause.)

Let the record now show that it is now 12:25.  
Ask Mr. Rochman to come in. (T. 4712)

\* \* \*

THE COURT: I think you're taking time. This is irrelevant to the real issue here. It's not the trip ticket we're talking about, you know what we're talking about. Now proceed to the real issues. Proceed.

MR. ROCHMAN: Again respecting --

THE COURT: Trip ticket seems to be absolutely irrelevant.

MR. ROCHMAN: Respectful exception to your Honor's remarks. (T. 4732)

\* \* \*



THE COURT: He's giving you testimony as to what the amount was and what he did and we're taking time with the trip ticket is just, in my opinion, taking too much time.

MR. ROCHMAN: That's the remark, sir, that I respectfully except to.

THE COURT: Yes. You except to them. Now proceed.

Q When did McInnis -- did McInnis show you the trip ticket?

When she handed out --

MR. SCHLAM: Objection, your Honor.

THE COURT: Let her answer the first question.

MR. RUDOLF: That was my first question.

THE COURT: No. You understand the first question. You keep quiet while she answers. (T. 4803)

\* \* \*

MR. TIGAR: I may not be able to develop that question entirely with this witness, your Honor. It may be.

THE COURT: You'd better start developing it because he was there. Ask him.



MR. TIGAR: I object to your Honor's observations.  
I really do, most respectfully.

THE COURT: I know, but you have objected to a  
lot of my observations and I've overruled --

MR. TIGAR: As is my right, your Honor.

THE COURT: That is your right and I will tell  
the jury it is your right and it is my right to rule on  
them and I am now ruling on it and I am overruling it and  
now proceed. (T. 4945-46)

\* \* \*

THE WITNESS: Yes.

MR. ROCHMAN: Just --

THE COURT: Wait a minute. You couldn't lay a  
foundation yourself. I was trying to do it for you. I do  
not want you to interrupt.

MR. ROCHMAN: I think I have done so.

THE COURT: Do you understand the English  
language.

MR. ROCHMAN: I respectfully except. I have  
done so. (T. 4972)

\* \* \*



MR. SCHLAM: Objection.

THE COURT: I think I will sustain the objection to that question. We are not getting down to specifics. These are general statements which may be completely irrelevant to this case. I would sustain the objection. Proceed.

MR. ROCHMAN: May I make an offer of proof on this?

THE COURT: No, you will follow the rules. Proceed.

MR. ROCHMAN: I am following the rules in making the request for an offer of proof.

THE COURT: Why do I have so much trouble with you? Proceed, please. (T. 4980)



APPENDIX D

Excerpts from Improper Summation by the Assistant U.S. Attorney

\* \* \*

Take as a second example, why Mr. Busic is telling the truth or whether he's covering up. Remember his story about how he purchased the dynamite?

Well, I think it's instructive on this point. Again, brazenly and I suggest that's the only word that fairly describes what he did. Brazenly he sits on that witness stand (indicating), and he tells you that story about the purchase of the dynamite. (T. 5366)

\* \* \*

It's illustrative, ladies and gentlemen, I believe on this topic because I suggest to you that you couldn't tell that story to a three year old and have that little baby believe it.

Why did Mr. Busic tell that nonsensical story? I suggest to you that there's a reason and it gets back to the question of whether Mr. Busic is telling the truth or whether he's covering up.



He didn't tell that -- he told that story because if he were to tell the truth about where he got the dynamite he would have to implicate other people. He would have to implicate persons whom he knows, whom he's involved with.

He would have to mention names. He would have to mention places. Mr. Busic didn't even know what the going price of eight sticks of dynamite was, but he peels off \$200. (T. 5368)

\* \* \*

You heard Mr. Busic's ability in the English language. I think it could be fairly characterized as excellent. Agent Strand isn't hard of hearing. He heard what Mr. Busic said. He wrote down what Mr. Busic said and Mr. Busic said that the others were participating with them in the takeover of Flight 355. (T. 5358)

\* \* \*

What kind of explanation is that? That's no explanation. It's evidence, on the contrary, that Mr. Busic's statement is false because if it were true then I suggest to you that he would have come up with a credible explanation. (T. 5363)



\* \* \*

And I ask you, Ladies and Gentlemen, why didn't Mr. Busic want to mention the person in Germany that helped him prepare this? The answer is, he will not under any circumstances inculcate, talk about, testify against, or tell you or anybody else other than those persons who are his associates, who else participated in this operation.

Now, try as he might to exculpate the co-defendants, I suggest to you that nevertheless, as to his wife, the evidence was too difficult even for Mr. Busic's agile mind to overcome. I suggest to you, Ladies and Gentlemen, that by the testimony of Mr. Busic, he came very, very close, if in fact he did not implicate her as a matter of law in the hijacking of this airplane. Because he was stuck as to his wife with the same formidable observations, the evidence, in trying to explain to you what his wife's role in the hijacking was.

Now, first of all, he has to get around the Janes books. His wife had the xerox copy in her bag, the fingerprint in the index, the pages are ripped out. (T. 5371)

\* \* \*

Again, why did he say on direct examination that it was in the cellar, and I suggest to you that the answer



is a very simple one. He said it because he was trying to help, to the best of his ability, his wife Julianne. And what did we learn more with respect to the dynamite that he had in his apartment that was shared by his wife? What did he tell Gordon Strand before he had a chance to concoct his story with the co-defendants? Gordon Strand asked him, well, you know, you had 8 sticks of dynamite in your apartment, Mr. Busic, did your wife know about it and what did Mr. Busic say in response to that? He said, well, she didn't know that it was dynamite, but I showed it to her and told her not to touch it because it was highly dangerous.

\* \* \*

Now, with respect to Mrs. Busic. Mrs. Busic, I suggest to you, testified but did not offer a defense. She simply did not offer a defense. No matter how much she tried to minimize, to hedge, to bob, to weave, the fact of the matter is, the undisputed fact, even by her own reluctant admission she knew before she got on the plane that the plane was going to be hijacked, no question about that. (T. 5378)

\* \* \*



I suggest to you that Mrs. Basic remembers what she wants to remember. Remembers what she thinks is going to help her and with regard to things that aren't going to help her no matter whether she knows about them or not, she tells you that she doesn't remember.

Now, let's take the contrast and see if that doesn't help us understand where Mrs. Basic is coming from.

(T. 5382)

\* \* \*

So basically, ladies and gentlemen, by way of example, when she doesn't want to talk about something, she can't recall. When she wants to tell you something, she will recall it very well. (T. 5387)

\* \* \*

She's not going to admit that she brought this onto the plane with her.

\* \* \*

With respect to the dynamite in her apartment, her husband tells the FBI that she was told that it was dangerous. She was asked about that.

Did your husband ever show you anything that appeared dangerous to you?

Not that I can recall.



I mean, what kind of a nonsensical explanation? See no evil; hear no evil.

I looked at him. I said, that's a terrible -- Zvonko, you can't hijack a plane.

Now, this is another interesting document for the purpose of showing Mrs. Basic's manipulative and selective testimony. (T. 5392-93).

\* \* \*

And then, Julianne -- smart girl -- then she figures, ah, I think I've a chance now to try to score a point with the jury. After the plane took off and after the hijacking was announced, and after time had passed during the thirty-one hours of the hijacking, she says, some time or other I saw it in the cockpit. And I don't understand how come my fingerprints weren't found on it.

And that, she thinks, is going to convince you that she is a very sincere person, even though her fingerprints weren't found on Government Exhibit 6. Gratuitously, she is willing to admit that she had it in her hand.

But then I suggest to you, ladies and gentlemen, that that admission wasn't worth anything. (T. 5394)

\* \* \*



I mean just by way of common sense, how ridiculous.

Mrs. Basic helped to translate a document from Croatian into English. And her expertise in Croatian is not as expert in English. She helped him with that.

Did she help him with the English in Government Exhibit 19, the demand note? No, she didn't help him with that. (T. 5396)

\* \* \*

She doesn't recall some of it, as far as you are concerned, because she knows some of that discussion concerned the hijacking and she simply isn't going to admit it.

\* \* \*

And now after it's all over, in line with the nonsensical and unintelligent, insulting defense that has been presented in this case, now she says, Oh, I did it because I was pregnant. (T. 5398)

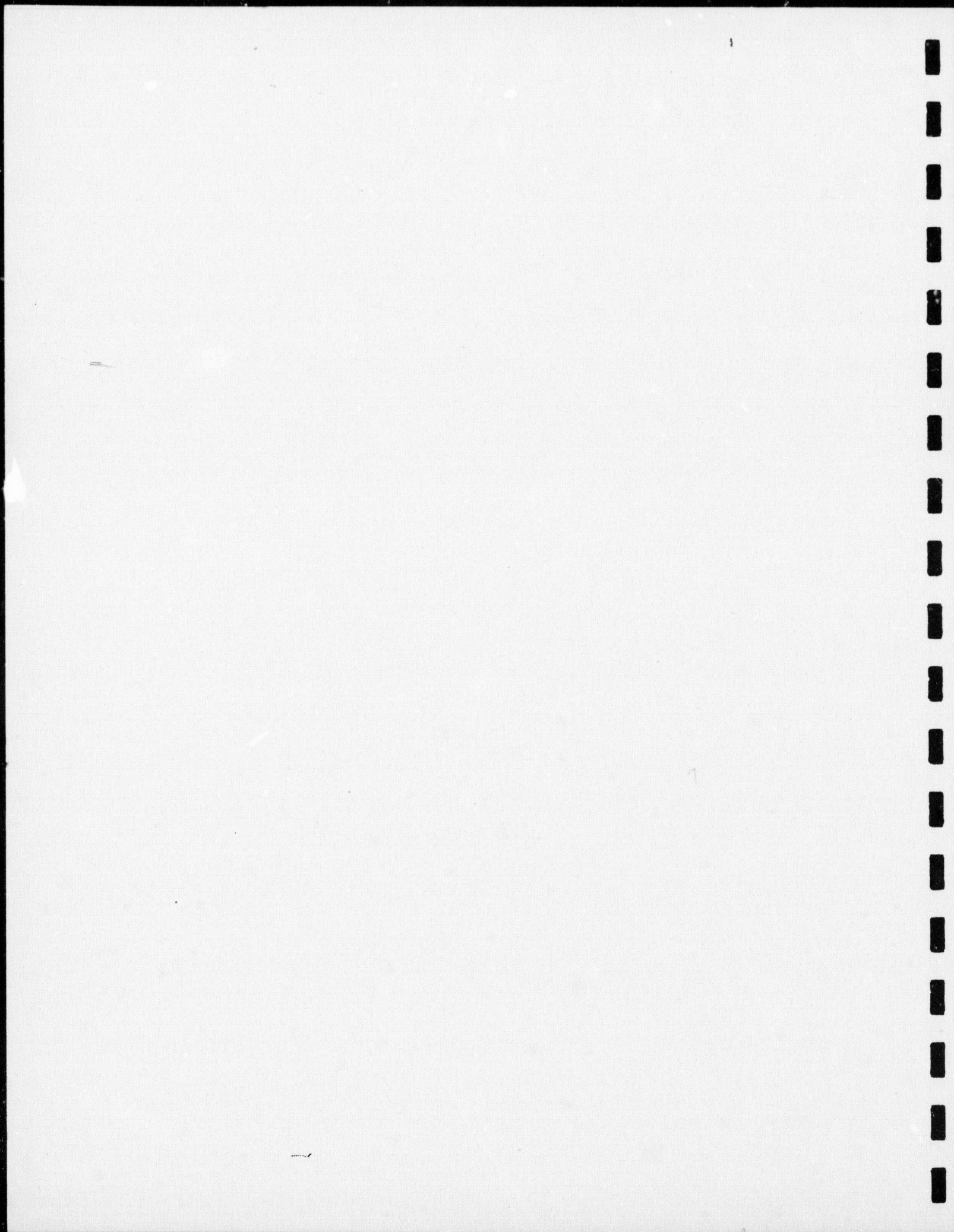
\* \* \*



\* \* \*

But Mrs. Basic, by her answer, cute, tries to admit so much so as not to lose all of her credibility. But as far as the nitty gritty is concerned, as far as admitting that she brought the explosives on the plane, as far as admitting that she told the passengers she brought the explosives on the plane, she simply isn't going to do it. (T. 5389)







AFFIDAVIT OF SERVICE

CITY OF WASHINGTON     )  
                              ) ss.  
DISTRICT OF COLUMBIA )

PIERCE O'DONNELL, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On September 30, 1977, I served the Brief for Defendants-Appellants Zvonko Busic and Julianne Busic and the Joint Appendix.

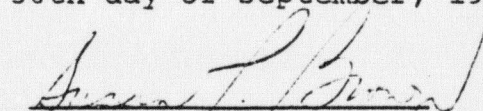
3. Service was effected by depositing two copies each of the Brief for Defendants-Appellants Zvonko Busic and Julianne Busic and the Joint Appendix, first class, postage prepaid, in the United States Mails at Washington, D. C. as follows:

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Ford Marrin Esposito Witmeyer & Bergman  
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\_\_\_\_\_  
PIERCE O'DONNELL

Subscribed and sworn to before me this 30th day of September, 1977.

  
\_\_\_\_\_  
Notary Public

MY COMMISSION EXPIRES JANUARY 31, 1981